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IN THE

Supreme Court of the United States

RH CAPITOL ASSOCIATES LLC and
PACIFIC INVESTMENT MANAGEMENT
COMPANY LLC,

Petitioners,

v.

MAYER BROWN LLP and JOSEPH P. COLLINS,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred by holding that an actor who drafts false securities offering documents for public distribution that are not explicitly attributed to that actor has not made a false statement in violation of Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5(b) promulgated thereunder, which ruling is directly contrary to the Fourth Circuit's holding in *In re Mutual Funds Investment Litig.*, 566 F.3d 111 (4th Cir. 2009), *cert. granted sub. nom*, *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525?

2. Whether the Second Circuit erred by holding that where false securities offering documents are not explicitly attributed to their drafter at the time of dissemination, an investor who is defrauded by those documents cannot satisfy the element of reliance in a Section 10(b) action against the drafter, a holding that, again, is directly contrary to the Fourth Circuit's decision in *Mutual Funds*?

3. Whether the Second Circuit erred by holding that where a law firm engineers sham loan transactions on behalf of its client, and then drafts false securities offering documents that fail to disclose those transactions, the law firm is not liable to defrauded investors under Rule 10b-5 for "engag[ing] in any act, practice, or course of business which operates ... as a fraud or deceit upon any person"?

Table of Contents

		Page
3.	The Second Circuit's Holding Conflicts with This Court's Decision in *Stoneridge*	24
4.	The Questions Presented by this Petition Are Critical to the Proper Functioning of the Securities Markets	27
CONCLUSION		30

TABLE OF APPENDICES

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 27, 2010, AMENDED MAY 6, 2010 ..... 1a

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK FILED MARCH 17, 2009 ..... 37a

APPENDIX C — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 71a

APPENDIX D — RELEVANT STATUTORY AND REGULATORY PROVISIONS 73a

TABLE OF CITED AUTHORITIES

Page

CASES

Anixter v. Home-Stake Production Co.,
77 F.3d 1215 (10th Cir. 1996) 15, 16

Asher v. Baxter Int'l Inc.,
377 F.3d 727 (7th Cir. 2004) 21

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 20, 21, 29

Central Bank, N.A. v.
First Interstate Bank, N.A.,
511 U.S. 164 (1994) ..... *passim*

City of Monroe Employees Ret. Sys. v.
Bridgestone Corp.,
399 F.3d 651 (6th Cir. 2005) 17

Cooper v. Pickett,
137 F.3d 616 (9th Cir. 1997) 19

Fidel v. Farley,
392 F.3d 220 (6th Cir. 2004) 17

Ganino v. Citizens Utilities Co.,
228 F.3d 154 (2d Cir. 2000) 21

Herman & MacLean v. Huddleston,
459 U.S. 375 (1983) 13, 14, 23

Cited Authorities

Page

Howard v. Everex Systems Inc.,
228 F.3d 1057 (9th Cir. 2000) 15-16, 22

In re Apple Computer Sec. Litig.,
886 F.2d 1109 (9th Cir. 1989) 21

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997) 19

In re Kidder Peabody Sec. Litig.,
10 F. Supp. 2d 398 (S.D.N.Y. 1998) 27, 28

In re LaBranche Sec. Litig.,
405 F. Supp. 2d 333 (S.D.N.Y. 2005) 27

In re Mutual Funds Investment Litig.,
566 F.3d 111 (4th Cir. 2009) ..... i, 16, 23

In re Navarre Corp. Sec. Litig.,
299 F.3d 735 (8th Cir. 2002) 19

In re Salomon Analyst Metromedia Litigation,
544 F.3d 474 (2d Cir. 2008) 20

In re Scholastic Corp. Secs. Litig.,
252 F.3d 63 (2d Cir. 2001) 18

In re Software Toolworks,
50 F.3d 615 (9th Cir. 1994) 8, 16

Cited Authorities

Page

In re Tronox, Inc.,
No. 09-6220 (SAS), 2010 U.S. Dist. LEXIS
67664 (S.D.N.Y. June 28, 2010) 28

In re Van Der Moolen Holding N.V. Sec. Litig.,
405 F. Supp. 2d 388 (S.D.N.Y. 2005) 27

Lattanzio v. Deloitte & Touche LLP,
476 F.3d 147 (2d Cir. 2007) 9, 10, 17

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000) 19

Rombach v. Chang,
355 F.3d 164 (2d Cir. 2004) 19

Schwartz v. Celestial Seasonings,
124 F.3d 1246 (10th Cir. 1997) 19

SEC v. Fehn,
97 F.3d 1276 (9th Cir. 1996) 29

SEC v. Tambone,
597 F.3d 436 (1st Cir. 2010) 13, 15

SEC v. Wolfson,
539 F.3d 1249 (10th Cir. 2008) 16, 18, 22

Shapiro v. Cantor,
123 F.3d 717 (2d Cir. 1997) 7, 8, 9

Cited Authorities

Page

Southland Secs. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353 (5th Cir. 2004) 18, 19

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) ..... *passim*

Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87 (2d Cir. 2001) 25

United States v. Finnerty, 533 F.3d 143 (2d Cir. 2008) 9

United States v. Ware, 577 F.3d 442 (2d Cir. 2009) 28, 29

Wright v.. Ernst & Young LLP, 152 F.3d 169 (2d Cir. 1998) 8, 9, 15, 17

Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194 (11th Cir. 2001) 15, 33

FEDERAL STATUTES AND RULES

28 U.S.C. § 1254(l) 1

15 U.S.C. § 77k(a) 14

15 U.S.C. § 78j(b) 1

Cited Authorities

Page

15 U.S.C. § 78u-4(b) 29

17 C.F.R. § 240-10b-5 ..... *passim*

OTHER AUTHORITIES

AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) 13

Brief of the Securities and Exchange Commission, *Amicus Curiae*, in Support of the Position of Plaintiffs-Appellants on the Issue Addressed and in Support of Neither Affirmance Nor Reversal, *Mazur v. Refco*, No. 09-1619 (2d Cir. April 17, 2009) 28

John C. Coffee, *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 Bus. Law. 1403 (2002) 27

Petition for Writ of Certiorari, *Janus Capital Group, Inc. v First Derivative Traders*, 130 S. Ct 3499 (2010) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioners PIMCO and RH Capital respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-36a) is reported at 603 F.3d 144. The opinion of the district court (App. 37a-70a) is reported at 609 F. Supp. 2d 304.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2010. A timely petition for rehearing en banc was denied on July 23, 2010. App. 71a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240-10b-5, are reproduced in the Appendix at 73a.

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[1] Citations to "App." refer to the Appendix to the Petition for a Writ of Certiorari filed with this Court. Citations to "CA" refer to the Confidential Appendix (since unsealed by court order) filed in the Second Circuit. Citations to "JA" refer to the Joint Appendix filed in the Second Circuit.

STATEMENT

This case presents similar questions to the ones pending before this Court in *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525.

The Second Circuit held that a law firm and one of its partners who (1) knowingly drafted false portions of securities offering documents on behalf of their client, and (2) reviewed, edited, and assisted in drafting other false portions of those documents, (3) intentionally effectuated a series of sham transactions designed to conceal their client's losses, and (4) in the case of the law firm partner, was criminally convicted on charges of securities fraud for his role in the scheme, cannot be held civilly liable in a private action for securities fraud under Section 10(b) of the Exchange Act.

Before it declared bankruptcy, Refco, Inc. ("Refco") was one of the largest brokerage and clearing firms in the international derivatives, currency, and futures markets.[2] For twenty years, Respondent Joseph P. Collins served as its outside counsel, first at his former firm and then for ten years as a partner at Respondent Mayer Brown LLP. Collins's relationship with Refco was sufficiently well-known that he was dubbed the "go-to guy at Refco" in press reports. CA 38-39, 279.

Plaintiffs allege that in the 1990s, Refco's clients suffered massive trading losses, leaving them unable to

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[2] The facts alleged are taken from the Second Amended Consolidated Class Action Complaint unless otherwise indicated.

repay hundreds of millions of dollars in loans that Refco had extended. CA 9-10, 170-72. Rather than admit that these crippling debts were uncollectible, Mayer Brown and Collins, together with Refco, formulated and implemented a scheme to conceal the losses. When the scheme unraveled in 2005, Refco rapidly fell into bankruptcy. CA 12. Collins was ultimately criminally convicted and sentenced to seven years in prison as a result of his role in the scheme.

Refco hid its losses by transferring the entire debt to a related shell entity known as RGHI, and listing the debt on its books as a receivable from RGHI. To avoid disclosing such a large receivable from a related corporation with no operations or assets, Refco engaged in a series of round-trip loans with its clients at the end of each financial reporting period. Just before Refco closed its books for the quarter, Refco subsidiaries would "loan" money to several of Refco's clients, who in turn would "loan" RGHI sufficient funds to allow RGHI to "repay" the debt to Refco. Within days or weeks after the quarter's end, the transactions were unwound when Refco "loaned" the money back to RGHI, which repaid Refco's clients who repaid the Refco subsidiaries. As a result of these transactions, the debt appeared to be a collectible one owed from Refco's current, solvent clients, rather than an uncollectible one from RGHI. CA 45-46, 179.

Acting as the Refco corporation's attorneys and authorized corporate agents, and therefore as the equivalent of Refco itself, Mayer Brown and Collins handled the paperwork for sham loan transactions. After Refco first incurred the losses, Mayer Brown

drafted contracts that extinguished the debts that clients owed Refco as a result of their trading losses, and then drafted contracts that transferred the then-uncollectible debt to RGHI as though it was a legitimate receivable. CA 174-75. Mayer Brown and Collins were also responsible for negotiating, structuring, and effectuating the quarterly sham transactions between Refco, RGHI, and Refco's clients. CA 180-95, CA 204-13. In the course of these transactions, on at least two occasions, a Mayer Brown attorney identified himself as Refco's "agent" and, once again acting as the equivalent of Refco, signed documents on its behalf. CA 206-07, 209-10. Collins supervised these activities, negotiated and revised loan documents, sent drafts of loan documents to Refco, and discussed the enforceability of the loans with Refco management. CA 205, 207-08, 210, 212, 214.

In 2004, Refco initiated a bond offering in connection with a leveraged buy-out ("LBO") that yielded tens of millions of dollars for Refco executives. Mayer Brown represented both Refco and RGHI in the LBO and – as publicly disclosed – represented Refco in the Bond offering. CA 41, 48-52, 54-55, 76. The Bonds were sold in a two-step process. First, Refco, with Mayer Brown acting on its behalf, drafted and circulated an Offering Memorandum, identifying Mayer Brown as Refco's counsel, and pursuant to which qualified investors purchased a series of bonds that had not been registered with the Securities and Exchange Commission ("SEC"). Second, Refco used the text of the Offering Memorandum as the foundation for a Registration Statement that registered a new series of bonds. CA 50-52, 53-55, 77, 169. Investors who

purchased the original bonds then exchanged their unregistered bonds for the registered series. CA 50-52. Petitioners allege that these documents were materially false and misleading because, among other things, they failed to disclose Refco's massive and uncollectible losses. Petitioners allege that Mayer Brown and Collins drafted materially false portions of the Offering Memorandum, reviewed and revised other sections of both documents, participated in group drafting sessions, and reviewed numerous comment letters from the SEC. CA 59-60, 64-65, 70-72, 77-78, 80-81, 116.

In 2005, Refco engaged in an initial public offering (IPO) of its stock. Mayer Brown and Collins drafted materially false portions of the IPO Registration Statement, which was prepared in conjunction with the Bond Registration Statement, and reviewed SEC comments. The IPO Registration Statement identified Mayer Brown as Refco's counsel and continued to conceal Refco's losses. CA 77-78, 89-90, 102-03, JA 379.

In October 2005, a little over a month after its IPO, Refco issued a press release disclosing the RGHI receivable, and admitting that financial statements going back to 2002 could no longer be relied upon. CA 105-106. Refco's stock price plunged 45% in a single day, and S&P and Moody's downgraded Refco's Bond ratings. The SEC began a formal investigation the next day, and Refco's CEO was arrested by the U.S. Attorney as a flight risk. Within a week, Refco announced it was filing for bankruptcy. CA 106-09.

On December 18, 2007, Collins was indicted for eleven felonies, including two counts of violating Rules

10b-5(a), (b), and (c), and one count of conspiracy to commit securities fraud. The indictment alleged that Collins and other Mayer Brown attorneys knowingly negotiated and drafted fraudulent loan documents and SEC filings; that Collins "made and caused to be made false public filings" with the SEC; and that Collins "made affirmative misrepresentations, material omissions, and told deceptive half-truths [that were] believed by Refco's investors and lenders in part because Collins's status as a partner with a well-known law firm and as Refco's long-time counsel gave them confidence that such representations were truthful, accurate, and complete." JA 356-58, 361, 364, 379-82, 384-86. On July 10, 2009 (while this matter was pending on appeal), Collins was convicted on five criminal counts, including two counts of securities fraud and one count of conspiracy to commit securities fraud.

Petitioners filed a class action securities fraud lawsuit against, inter alia, Refco officers and directors, underwriters involved in the IPO and Bond Offering, Refco's auditors, and Respondents Mayer Brown and Collins. With respect to Respondents, Petitioners alleged that through their roles in drafting Refco's false offering documents, Respondents had made false statements in violation of Section 10(b) and Rule 10b-5(b), and that by both drafting these documents and by effectuating the sham transactions that Refco used to conceal its debt, Mayer Brown and Collins engaged in a "scheme ... to defraud" and engaged in a "course of business which operates ... as a fraud or deceit" in violation of Rules 10b-5(a) and (c). The District Court dismissed Petitioners' claims on the ground that Mayer Brown and Collins had done no more than "aid and abet"

Refco's fraud, and thus their conduct was inactionable under *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994) and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). App. 58a-59a.

On appeal, the Second Circuit affirmed. With respect to Petitioners' Rule 10b-5(b) claims, the Second Circuit held that "secondary actors" – which it defined to mean "parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud," App. 3a n.1 – cannot be held liable under Rule 10b-5(b) for false statements they draft unless the statements are publicly attributed to them at the time they are disseminated. The Second Circuit held that in the absence of such attribution, the actor has neither "made" a statement under Rule 10b-5(b), nor has the investing public "relied" on the actor's conduct, as is necessary in a private action. In so doing, the Second Circuit rejected the position advocated in an *amicus curiae* brief by the SEC that would permit liability to be imposed on those who "create" false statements for public distribution, regardless of whether those statements are publicly attributed to them.

The Second Circuit began by reviewing its older precedents generated in the wake of this Court's holding in *Central Bank* that Section 10(b) does not impose liability for "aiding and abetting." Following *Central Bank*, the Second Circuit on several occasions sought to determine the degree of conduct that would distinguish primary liability from aiding-and-abetting under Section 10(b). In *Shapiro v. Cantor*, 123 F.3d 717 (2d Cir. 1997), the Second Circuit held that "[I]f *Central*

Bank is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting..." *Id.* at 720. Subsequently, in *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998), the Second Circuit addressed allegations that the defendant auditors had violated Section 10(b) by giving oral approval to a corporation's false financial statements. In that context, the Second Circuit interpreted *Shapiro* to require that "the misrepresentation ... be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision." 152 F.3d at 175. In so doing, the court distinguished what it described as its "bright-line rule" from the Ninth Circuit standard that would allow "third parties [to] be primarily liable for statements made by others in which the defendant had significant participation." *Id.* (citing *In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1994)).

Purporting to follow these precedents in determining Respondents' liability, the Second Circuit held that "secondary actors can be liable in a private action under Rule 10b-5 for only those statements that are explicitly attributed to them." App. 20a. The Second Circuit rejected the position of the SEC that liability under Rule 10b-5 should be imposed on any person who is responsible for "creating" a false statement on which investors rely, regardless of whether the statement is attributed to the drafter. Instead, the Second Circuit held that "[t]o be cognizable, a plaintiff's claim against a secondary actor must be based on that actor's own 'articulated statement,' or on statements made by another that have been *explicitly* adopted by the

secondary actor." App. 20a. The Second Circuit also rejected the argument that liability should be imposed even without explicit attribution if investors are made aware of the true drafter through other sources of information. *See id.* ("the public's understanding that a secondary actor 'is at work behind the scenes' are alone insufficient") (quoting *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 155 (2d Cir. 2007)).

Notably, this holding marked the first time that the Second Circuit had rejected liability for someone who was actually alleged to have drafted false statements. App. 19a. In each of its prior cases discussing the need for explicit attribution, the defendants were alleged to have done no more than review statements drafted by others. *See Lattanzio*, 476 F.3d at 154-55; *Wright*, 152 F.3d at 171-73; *Shapiro*, 123 F.3d at 719-21. As a result, as the Second Circuit acknowledged (App. 19a), previous circuit precedent had suggested that attribution was necessary only where there were no other allegations of fraudulent conduct. *See United States v. Finnerty*, 533 F.3d 143, 150 (2d Cir. 2008).

The court justified its blanket attribution rule on two grounds. First, the court held that absent attribution, plaintiffs could not satisfy the "reliance" element of a private Rule 10b-5(b) cause of action. The court reasoned that statements attributed to a well-known law firm or a similarly prominent actor are more likely to be credited and relied upon by investors; absent attribution, "reliance on that firm's participation can only be shown through 'an indirect chain . . . too remote for liability.'" App. 22a (quoting *Stoneridge*, 552 U.S. at 159).

Second, the court rejected the SEC's "creator" standard as indistinguishable from the "significant participation" standard it had previously rejected, and reaffirmed its "bright-line rule" requiring attribution that it had articulated in previous cases. App. 22a. The court reasoned that even if the public was aware of the true drafter of the statement, "[p]ublic understanding that [a secondary actor] is at work behind the scenes does not create an exception to the requirement that an actionable misstatement be made by the [secondary actor]" App. 23a (quoting *Lattanzio*, 476 F.3d at 155 (alterations in original)). The court also held that the SEC's "creator" standard would be too difficult for courts to administer. App. 24a.

With respect to Petitioners' claims under Rules 10b-5(a) and (c), the Second Circuit held that imposing liability would run afoul of this Court's *Stoneridge* decision. In *Stoneridge*, the plaintiffs alleged that certain vendors of cable boxes had intentionally engaged in sham transactions with a cable company in order to allow the cable company to inflate its reported revenues. This Court held that the plaintiffs had not relied on the vendors' deceptive acts because those acts "were not disclosed to the investing public," 552 U.S. at 161, and the causal connection between the vendors' conduct and the false statements ultimately issued by the cable company was too attenuated. As this Court put it, "nothing respondents did made it necessary or inevitable for [the cable company] to record the transactions as it did." *Id.*

The Second Circuit concluded that, under *Stoneridge*, Respondents' deceptive acts were not

publicly disclosed, and their conduct did not make it "necessary or inevitable" that Refco would misreport its financial results. Therefore, in the Second Circuit's view, Petitioners relied only on Refco's statements, and not on Respondents' conduct. App. 29a-31a. Notably, in so holding, the Second Circuit flatly refused to consider whether Respondents' role in drafting Refco's false securities filings rendered the false statements "necessary or inevitable" because – as it had held earlier – those statements were not publicly attributed to Respondents. App. 30a n.7. Moreover, although in *Stoneridge* this Court's causation analysis depended in part on its conclusion that the *Stoneridge* vendors' conduct "took place in the marketplace for goods and services, not in the investment sphere," 552 U.S. at 166, the Second Circuit held that such considerations were in fact not "materially relevant" to an analysis of whether Respondents were liable for their role in the scheme. App. 31a. Significantly, the Second Circuit ultimately suggested that after *Stoneridge*, a secondary actor could *never* be held liable for participating in a fraudulent scheme, writing that "it is somewhat unclear how the deceptive conduct of a secondary actor could be communicated to the public and yet remain 'deceptive.'" App. 30a.

Judge Parker filed a concurring opinion recognizing that Second Circuit precedent had not been consistent on the need for attribution, and that the issue had been the subject of considerable debate among the other Circuits. Judge Parker also recognized the SEC's argument that an attribution requirement would "prevent the securities laws from deterring individuals who make false statements anonymously or through

proxies." App. 36a. Finally, Judge Parker agreed that the Second Circuit's rule had the incongruous effect of shielding Collins and Mayer Brown from civil liability despite Collins's criminal conviction and seven-year prison sentence. As a result, Judge Parker wrote: "In light of the importance of the existence, *vel non*, of an attribution requirement to the securities laws, the bar, and the securities industry, this case could provide our full Court, as well as, perhaps, the Supreme Court, with an opportunity to clarify the law in this area." *Id.*

REASONS FOR GRANTING THE PETITION

By holding that a behind-the-scenes drafter has neither made statements, nor has the public relied on such statements, the Second Circuit has taken an extreme approach to interpreting Rule 10b-5(b) that is in direct conflict with the interpretations of other Circuits. Moreover, in rejecting Petitioners' claims under Rules 10b-5(a) and (c), the Second Circuit significantly broadened this Court's holding in *Stoneridge*. Because the Second Circuit's holding immunizes a wide swath of intentionally deceptive conduct, and directly conflicts with holdings of other Courts of Appeals, it raises significant questions of national importance that warrant review by this Court.

1. The Circuits Are Split as to the Level of Conduct Necessary to Establish that a Defendant "Made" a Statement under Rule 10b-5(b)

This Court has already granted certiorari in *Janus Capital* to determine the level of conduct necessary before a defendant may be deemed to have engaged in

a primary violation of Section 10(b). *See* Petition for Writ of Certiorari, *Janus Capital Group, Inc. v First Derivative Traders*, 130 S. Ct 3499 (2010), at 10 ("*Janus* Petition").

Rule 10b-5(b), promulgated pursuant to Section 10(b), makes it unlawful "[t]o make any untrue statement of a material fact..." in connection with the purchase or sale of securities. 17 CFR §240.10b-5(b). "Make" means "[t]o cause to exist or happen; bring about; create." AMERICAN HERITAGE COLLEGE DICTIONARY 835 (4th ed. 2002). Therefore, under the plain meaning of Rule 10b-5(b), a person who creates a statement or causes a statement to exist by, for example, dictating its language, "make[s]" a statement. *Cf. SEC v. Tambone*, 597 F.3d 436, 443 (1st Cir. 2010) (quoting several dictionary definitions of the word "make," including "create [or] cause," "compose," and "cause (something) to exist"). Here, Petitioners allege that Collins and Mayer Brown "drafted" and "revised" key portions of Refco's false SEC filings, and thus Petitioners have properly alleged that Respondents made false statements in violation of Rule 10b-5(b) and Section 10(b).

Indeed, in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), this Court held that one who drafts false portions of a registration statement filed with the SEC is liable in a private action under Section 10(b). In that case, the Court considered the question whether Section 11 of the Securities Act of 1933 provided the exclusive remedy for false statements contained in registration statements, or whether Section 10(b) also provides a remedy for purchases made in reliance on false

registration statements. The Court reasoned that Section 10(b) liability was necessary notwithstanding the availability of Section 11 remedies because

> [C]ertain individuals who play a part in preparing the registration statement generally cannot be reached by a Section 11 action. These include corporate officers other than those specified in 15 U.S.C. § 77k(a), lawyers not acting as "experts," and accountants with respect to parts of a registration statement which they are not named as having prepared or certified. If ... purchasers in registered offerings were required to rely solely on Section 11, they would have no recourse against such individuals even if the excluded parties engaged in fraudulent conduct while participating in the registration statement. The exempted individuals would be immune from federal liability for fraudulent conduct even though Section 10(b) extends to 'any person' who engages in fraud in connection with a purchase or sale of securities.

Id. at 387 n.22.[3]

Notwithstanding this authority, the Second Circuit relied on its previous case law interpreting *Central*

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[3] *Huddleston* was decided before *Central Bank*, but the Court recognized that the availability of aiding and abetting liability was an undecided question, and based its reasoning on primary liability. *See Huddleston*, 459 U.S. at 379 & n.5.

Bank to hold that Respondents had not made false statements because the offering documents were not publicly attributed to Respondents at the time of their dissemination. App. 20a.

In *Central Bank*, this Court distinguished "aiding and abetting" from "primary liability" on the basis of whether the defendant engaged in deceptive conduct. 511 U.S. at 176. As this Court put it, "the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act ... We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute." *Id.* at 177-78. Because the plaintiff in that case conceded that the defendant had only "aided and abetted" the primary violator, this Court did not provide further explanation on how to differentiate between primary liability and mere aiding and abetting. *See id.* at 191-92.

Since that time, the Circuits have developed at least four different approaches to determining whether a defendant "made" a misstatement within the meaning of *Central Bank*. This split has been specifically acknowledged by the First, Second, Tenth, and Eleventh Circuits. *See Tambone*, 597 F.3d at 447; *Wright*, 152 F.3d at 174-75; *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001).

The Ninth Circuit has held that "substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability" after *Central Bank*. *See Howard v. Everex*

Systems Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *see also Software Toolworks*, 50 F.3d at 628-29 & n.3. Moreover, the Fourth Circuit *In re Mutual Funds Investment Litigation*, 566 F.3d 111 (4th Cir. 2009), *cert. granted sub. nom, Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525, held that the defendants "made" statements where they had "helped draft" misleading documents, *id.* at 121, a decision that the *Janus* Petitioners have argued means that the Fourth Circuit imposes liability for "participation" in a false statement. *Janus* Petition at 10.

The Tenth Circuit, by contrast, has rejected such an approach in favor of a rule that requires the defendant to have actually drafted the false statement. *See Anixter*, 77 F.3d at 1226-27. However, the Tenth Circuit does not require that the false statement be publicly attributed to the drafter at the time of dissemination. *See SEC v. Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008) ("We have never adopted an attribution requirement in a private securities case....").

The Sixth Circuit has held that it will impose primary liability if a defendant communicates false information to a different entity, in the expectation that the entity will publicize that information. As the Sixth Circuit explained in a case involving two related corporations, "We do not foreclose the possibility that, going forward, Firestone may be held liable for Bridgestone's misrepresentations to the extent the [plaintiff] can prove Firestone communicated misleading results to Bridgestone. The requirement that the plaintiff allege that the defendant made a misrepresentation does not mean that the plaintiff must allege that the defendant

communicated that misrepresentation directly to the plaintiff." *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005).[4]

Finally, the Second Circuit took the most extreme position and held that a secondary-actor defendant has not "made" a statement within the meaning of Section 10(b), and thus is not primarily liable, unless the statement is attributed to that actor at the time of the misstatement. As the Second Circuit held in this case, even if the public is aware of the true drafter of the statement, absent attribution, "[p]ublic understanding that [a secondary actor] is at work behind the scenes does not create an exception to the requirement that an actionable misstatement be made by the [secondary actor]" App. 23a (quoting *Lattanzio*, 476 F.3d at 155). Notably, although the Second Circuit purported to limit

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[4] In *Fidel v. Farley*, 392 F.3d 220 (6th Cir. 2004), the Sixth Circuit relied on *Wright* when refusing to hold an auditor liable for certain financial statements that had been designated as "unaudited" by the issuing corporation. This holding is entirely consistent with the Sixth Circuit's holding in *Bridgestone* one year later. In *Fidel*, the plaintiffs had not alleged that the auditor had played *any* role in drafting the allegedly false statements – thus it had not taken any action that could constitute "making" a statement. *See id.* at 235 ("Ernst & Young did not assist in the preparation or presentation of this financial information, nor did it ever express an opinion about it. It therefore cannot be held liable for making a false statement, *because it made no statement with regard to these financial results.*") (emphasis added). In *Bridgestone*, by contrast, the Sixth Circuit held that when a defendant does "make" a false statement that is transmitted through another actor to the public, the defendant has acted deceptively in violation of Section 10(b). 399 F.3d at 686 n.29.

its rule only to its definition of "secondary actors," none of the Circuits cited above has suggested that different rules attach to primary and secondary actors, and nor have they distinguished the legal rules applicable to corporations and their employees from the legal rules applicable to other actors. To the contrary, in the decisions described above, the Sixth, Ninth, and Tenth Circuits applied their rules to "secondary" actors (under the Second Circuit's definition) with no indication that a primary actor would receive different treatment, and the Fourth Circuit in *Janus* applied its rule to both a "secondary" actor and a "primary" actor under the Second Circuit's definition.[5] Significantly, the Second Circuit did not categorically rule out the possibility that its holding applied equally to primary actors, App. 26a n.6, and never offered a justification for why the identity of an actor should alter the definition of what it means to "speak" under Rule 10b-5(b).[6]

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[5] In *Wolfson*, the Tenth Circuit relied on precedent involving corporate employees to determine whether the defendant, an outside consultant, had "made" a statement for Section 10(b) purposes, demonstrating that the Tenth Circuit does not use different legal tests to determine liability based on the status of the actor. 539 F.3d at 1260-61.

[6] There has previously been general agreement that if a corporate officer drafts a statement that is issued by the corporation, or supplies false information to be included in the corporation's published statements, that officer has "made" a statement within the meaning of Section 10(b) whether or not the information was specifically attributable to him or her. *See Southland Secs. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 365 (5th Cir. 2004); *In re Scholastic Corp. Securities Litigation*, 252 F.3d 63, 75-76 (2d Cir. 2001) (vice president liable because he was "involved in the drafting, producing, reviewing

(Cont'd)

Adding to this confusion, several Circuits – including the Second – have held that an issuing corporation will be liable for passing false information to analysts, which is then presented to the general public, even when that information is not publicly attributed to the issuer. *See Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000); *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *Southland Secs. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 373 (5th Cir. 2004); *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1428 (3d Cir. 1997); *Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1997). These holdings are in tension with the precedents that require the defendant to have actually drafted, or have been publicly named, before the defendant will be deemed to have made a statement under Section 10(b).

Thus, the disagreement among the Circuits as well as the inconsistent standards in determining whether an actor has spoken for Section 10(b) purposes warrants this Court's review.

(Cont'd)

and/or disseminating of the false and misleading statements"); *Schwartz v. Celestial Seasonings*, 124 F.3d 1246, 1254 (10th Cir. 1997). While courts disagree as to how much detail a complaint must contain in order to allege that a particular corporate officer is responsible for drafting a document when the officer's name is not attached, there is broad agreement that, if the plaintiff can sufficiently demonstrate that a corporate officer drafted a false public document with scienter, the officer may be liable. *Compare Southland*, 365 F.3d at 364-65 *with Celestial Seasonings*, 124 F.3d at 1254.

2. The Circuits are Split as to Whether and How a Drafter Must be Identified to Satisfy the Element of Reliance in a Private Action

This Court has already granted certiorari in *Janus* to determine whether a plaintiff can satisfy the element of reliance where allegedly false statements were not explicitly attributed to the defendant at the time of dissemination. *See Janus* Petition at 14-15.

Neither *Central Bank* nor *Stoneridge* held that attribution is necessary for the plaintiff to satisfy the element of reliance. To the contrary, *Stoneridge* held that reliance may be satisfied where the defendant's "*deceptive acts*" were "disclosed to the investing public," or where the defendant's conduct made the issuance of false statements "necessary or inevitable." 552 U.S. at 159, 161 (emphasis added). Neither of these requirements suggests that the defendant's *identity* – in addition to its acts – must be publicly disclosed. Indeed, courts have typically held that to satisfy the element of reliance, it is only necessary to show that the allegedly false *information* was material to investors – not that it was attributed to any particular source. *See Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988); *see also In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474, 481 (2d Cir. 2008) ("[T]he premise of *Basic* is that, in an efficient market, share prices reflect 'all publicly available information, and, hence, any material misrepresentations.' It thus does not matter, for purposes of establishing entitlement to the presumption [of reliance], whether the misinformation was transmitted by an issuer, an analyst, or anyone else.").

Moreover, since *Basic*, courts have held that in a fraud-on-the-market case, the market price of the stock is presumed to reflect all available public information, even if the information is not contemporaneously disclosed in the same document. *See Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 732 (7th Cir. 2004); *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989). Thus, even if the identity of the true drafter must be known to the public, courts have long agreed such information can be transmitted in a variety of ways.

Here, Petitioners alleged that Respondents' "deceptive acts" – in the form of the words they drafted – were publicly disclosed. Because the statements themselves were unquestionably material to investors, this Court's precedents suggest that the element of reliance has been properly alleged. *See Stoneridge*, 552 U.S. at 160 ("reliance is tied to causation, leading to the inquiry whether respondents' acts were immediate or remote to the injury"); *Basic*, 485 U.S. at 246-47.

In the alternative, if reliance requires knowledge of the drafter's identity, Petitioners have alleged that Mayer Brown's and Collins's relationship to Refco had been well-publicized over the years, that Mayer Brown was identified as Refco's counsel in the offering documents, and that Respondents' role in drafting Refco's documents was known to Refco investors and to the market generally. Thus, Petitioners have properly alleged these are facts upon which investors relied.

Nonetheless, the Second Circuit held that there can be no reliance absent knowledge of the identity of the drafter, and that courts may not consider any sources of information available to the public other than the documents in which the allegedly false statements appear.[7] In so holding, the Second Circuit created at least a three-way split among the Circuits regarding whether and to what extent a statement must be attributed to the drafter for liability to attach.

At least three Circuits have held that knowledge of the identity of the source of the information is not necessary to establish reliance. *See Everex*, 228 F.3d at 1061 n.5 (requiring only the defendant's "substantial participation" in the drafting of false statements before liability may be imposed); *Wolfson*, 539 F.3d at 1258;

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[7] Although the Second Circuit held that courts may not consider information generally available to investors when determining whether the public relies on the involvement of secondary actors in drafting false public documents, the Second Circuit reserved the question whether the public may presume that corporate officers play a role in drafting public documents, and thus may be said to rely on their involvement. App 26a n.6. The Second Circuit did not explain why only the public's knowledge of the typical role of corporate officers, and not their knowledge of the typical roles played by other corporate agents – such as attorneys – will be considered when determining whether a complaint adequately alleges reliance. Moreover, although the Second Circuit justified its approach to reliance on the ground that investors will have more confidence in statements by a "well-known national law firm," App. 22a, the court did not explain whether courts must now, on a case-by-case basis, determine whether a law firm is sufficiently "well-known" to encourage public confidence before the reliance element may be satisfied.

Bridgestone, 399 F.3d at 686 n.29. Moreover, as described above, the numerous precedents permitting liability when corporate issuers funnel false information to analysts suggest that reliance does not depend on knowledge of the source of the information.

In contrast to these precedents, the Fourth Circuit in *Janus* held that knowledge of the drafter's identity is necessary to establish reliance, but disagreed with the Second Circuit that this knowledge may only be obtained through explicit attribution in the document itself. Instead, the Fourth Circuit held that it will consider other information available to investors to determine whether the drafter's identity was known prior to the investment decision. *Mutual Funds*, 566 F.3d at 124.[8]

Here, however, the Second Circuit held not only that reliance requires knowledge of the drafter's identity, but that courts should refuse to consider any source of such knowledge beyond the document containing the allegedly false statements. App. 23a. This holding not only conflicts with the holdings of the Fourth, Sixth, Ninth, and Tenth Circuits, but also with this Court's prior holding in *Huddleston*. Once again, the divergent approaches of the Courts of Appeals warrants this Court's review.

[8] The Eleventh Circuit has also held that knowledge of the drafter's identity is necessary to satisfy the element of reliance, but it has not had the opportunity to decide between the Second Circuit's approach, and the Fourth Circuit's. *See Ziemba*, 256 F.3d at 1205.

3. The Second Circuit's Holding Conflicts with This Court's Decision in *Stoneridge*

Finally, as described above, Petitioners also contended that Defendants should be held liable under Rules 10b-5(a) and (c) for their role in drafting Refco's financial statements, as well as their role in developing the scheme and effectuating the sham loan transactions. In rejecting these claims, the Second Circuit acknowledged that under its interpretation of *Stoneridge*, there may be no situation in which a secondary actor would be liable for deceptive conduct. App. 30a.

Stoneridge requires that courts first look to whether the "deceptive acts" were "communicated to the public." 552 U.S. at 158-59. If this has not occurred, courts must examine the "chain" between the acts and the ultimate false statement to determine whether the conduct made a false statement "necessary or inevitable," or whether the conduct concerned the "investment sphere." *Id.* at 159, 161, 166. Here, as described above, many of Respondents' deceptive acts – their words – were made public. This stands in sharp contrast to the facts of *Stoneridge*, where the deceptive acts, which included "both oral and written statements," *id.* at 158, were not publicly disclosed, and where the defendants "had no role in preparing" the false public statements that formed the basis of the plaintiffs' claims. *Id.* at 155.

Additionally, in *Stoneridge*, the secondary-actor defendants did not act on behalf of the corporation that issued the false statements, but instead acted as "suppliers" and "customers." *Id.* at 166. Thus, this Court

considered their behind-the-scenes actions to be independent of the primary actor's decision to misreport its financial results. *Id.* at 161. As this Court put it, "nothing [the defendants] did made it necessary or inevitable" that false financial statements would issue. *Id.* Here, however, Mayer Brown and Collins developed the round trip loan scheme, negotiated and effectuated the sham loans, and drafted Refco's false SEC filings, all acting as Refco's agents and indistinguishable from Refco itself. Because "[a] corporation can only act through its employees and agents," *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001), Respondents' conduct was Refco's conduct, rendering the ultimate false statements a "necessary or inevitable" result of their actions. *Cf. id.* (in *Central Bank* "there was no allegation that the defendants were agents of the alleged defrauder"). Moreover, as a factual matter, Respondents' conduct made it "necessary or inevitable" that Refco's offering documents would be misstated because only very few Refco employees were aware of the fraud or in a position to take corrective action. Instead, they were relying on Respondents to craft appropriate disclosures.

Finally, Mayer Brown's and Collins's conduct occurred in the "investment sphere," 552 U.S. at 166. As *Stoneridge* explained, conduct that occurs "in the marketplace for goods and services" has less of a causal relationship to a securities fraud claim than conduct that occurs in the "investment sphere." *Id.*; *see also id.* at 161 (faulting the plaintiff for seeking to apply §10(b) "beyond the securities markets—the realm of financing business—to purchase and supply contracts—the realm of ordinary business operations"). Here, Respondents'

conduct was directly related to sham loan transactions – i.e., financing – and concerned the creation of false securities offering documents. Moreover, Refco itself was a brokerage firm, and the entire scheme was financed out of its customers' brokerage accounts. Thus, the deceptive conduct was inextricably intertwined with the "investment sphere" and there was a direct relationship between Respondents' actions and the false statements that followed.

Nonetheless, in considering Respondents' course of conduct under Rules 10b-5(a) and (c), the Second Circuit refused to accord *any* weight to Respondents' creation of, and control over, Refco's false SEC filings, solely because of the lack of attribution, App. 30a n.7 – a requirement that the court recognized appeared nowhere in *Stoneridge* itself, *see* App at 20a. The Second Circuit also did not give any weight to the fact that Mayer Brown and Collins were authorized corporate agents and thus indistinguishable from Refco itself, and refused to consider the fact that Respondents' conduct directly concerned financing and securities filings, App at 31a, despite *Stoneridge*'s emphasis on considering the context of the defendant's conduct.

The Second Circuit acknowledged that under its interpretation of *Stoneridge*, "it is somewhat unclear how the deceptive conduct of a secondary actor could be communicated to the public and yet remain 'deceptive.'" App 30a. Because such a reading is at odds with *Stoneridge* itself, which reiterated that the "right of action in §10(b) continues to cover secondary actors who commit primary violations," 552 U.S. at 166, the Second Circuit's reading of *Stoneridge* is flawed and review by this Court is warranted.

4. The Questions Presented by this Petition Are Critical to the Proper Functioning of the Securities Markets.

The issues presented in this Petition are critical for the proper functioning of the securities markets. Third party "gatekeepers" play a critical role in keeping corporations honest. *See* John C. Coffee, *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 Bus. Law. 1403 (2002). Thus, imposing this sort of liability may be necessary to ensure the effectiveness of the securities laws.

Both Judge Parker writing in concurrence, and the SEC writing as *amicus*, recognized that the issues presented in this case are exceptionally important. The Second Circuit immunized a wide class of persons who intentionally draft false statements for public distribution, and eliminated an important source of investor protection from the securities laws. For example, the Second Circuit would immunize subsidiary corporations that draft false statements and supply them to their corporate parents for public distribution, thus allowing subsidiaries to "freely disseminate false information to the market through its parent, but investors relying on that information ... would be left with no remedy." *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 408 (S.D.N.Y. 1998). This is a scenario that happens frequently and has been examined by numerous courts. *See, e.g., In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 402-03 (S.D.N.Y. 2005); *In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 351 (S.D.N.Y. 2005); *Kidder Peabody*, 10

F. Supp. 2d at 406-07. Moreover, the Second Circuit's holding also immunizes parent corporations that filter false information to the public through their subsidiaries. For example, in *In re Tronox, Inc.*, No. 09-6220 (SAS), 2010 U.S. Dist. LEXIS 67664 (S.D.N.Y. June 28, 2010), a parent corporation created a subsidiary for the purpose of spinning it off as a separate entity through an initial public offering of its securities. The newly-formed corporation quickly went bankrupt due to its failure to properly account for hundreds of millions of dollars in expected environmental liabilities. *See id.* at *2-3. Despite the obvious fact that the parent corporation was responsible for the false statements in the subsidiary's offering documents – and had used the IPO as a mechanism for shuffling liabilities off its books – the district court, relying on the Second Circuit's holding in this case, dismissed all Section 10(b) claims against the parent and its officers. *See id.* at *8.

The Second Circuit's holding may also immunize anyone who adopts a false identity, or speaks anonymously. As the SEC pointed out in its amicus brief, "[t]his concern is not merely theoretical. Wrongdoers in fact do distribute false and misleading statements that have a false name or no one's name attached to them." Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Position of Plaintiffs-Appellants on the Issue Addressed and in Support of Neither Affirmance Nor Reversal, Mazur v Refco, No. 09-1619 (2d Cir. April 17, 2009), at 15. Indeed, in *United States v. Ware*, 577 F.3d 442 (2d Cir. 2009), the Second Circuit affirmed the criminal conviction of an attorney who promoted stocks by issuing false press

releases with fictional attributions. *See id.* at 447-50.[9] It is questionable whether this conviction was proper under the Second Circuit's reasoning; even if it was, however, the Second Circuit would apparently bar investors injured by the fraud from bringing Section 10(b) claims against the attorney, on the ground that they could not have relied on his conduct because they did not know of his involvement.

Although the Second Circuit believed that an attribution requirement avoids litigation and allows individuals to predict when they will be exposed to liability (App. 24a-25a), the decision does not assist actors in determining whether their conduct is *deceptive*; instead, it assists them in determining how to engage in deceptive conduct while remaining immune. Such "protection" is unnecessary; moreover, the high pleading standards imposed in securities actions already provide robust protections against frivolous accusations of fraud. *See* 15 U.S.C. §78u-4(b). In any event, as this Court held in *Basic*, "ease of application alone is not an excuse for ignoring the purposes of the securities acts and Congress' policy decisions." 485 U.S. at 236. As the District Court put it in this case: "[A] bright line between principals and accomplices may not be appropriate. There are accomplices and there are accomplices: after all, in the criminal context when the Godfather orders a hit, he is only an accomplice to murder." App. 69a n.15.

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[9] Ware was convicted as a primary violator because the subject companies were unaware of his activities, and thus he could not have "aided and abetted" anyone. *See id.* at 453; *see also SEC v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996) (the existence of a separate primary violator is an element of the offense of aiding-and-abetting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 27, 2010, AMENDED MAY 6, 2010

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC and RH CAPITAL ASSOCIATES LLC,

Plaintiffs-Appellants,

PIMCO FUNDS: PACIFIC INVESTMENT MANAGEMENT SERIES, *ET AL.*,

Plaintiffs,

v.

MAYER BROWN LLP and JOSEPH P. COLLINS,

Defendants-Appellees,

REFCO INC., *ET AL.*,

Defendants.*

* The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

Docket No. 09-1619-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

April 27, 2010, Decided
As Amended May 6, 2010

Appendix A

JUDGES: Before: CABRANES and PARKER, Circuit Judges, and AMON, District Judge. ** Judge Parker concurs in the judgment and in the opinion of the Court and files a separate concurring opinion.

** The Honorable Carol B. Amon, of the United States District Court for the Eastern District of New York, sitting by designation.

OPINION BY: JOSE A. CABRANES

OPINION

JOSE A. CABRANES, *Circuit Judge*:

This appeal presents primarily two questions about the scope of federal securities laws: (1) whether, under § 10(b) of the Securities and Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5 ("Rule 10b-5"), 17 C.F.R. § 240.10b-5, a corporation's outside counsel can be liable for false statements that those attorneys allegedly create, but which were not attributed to the law firm or its attorneys at the time the statements were disseminated; and (2) whether plaintiffs' claims that defendants participated in a scheme to defraud investors are foreclosed by the Supreme Court's decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

Appendix A

Plaintiffs-appellants, Pacific Investment Management Company LLC and RH Capital Associates LLC (jointly, "plaintiffs") appeal from a judgment of the United States District Court for the Southern District of New York (Gerard E. Lynch, Judge) dismissing their claims against defendants-appellees Mayer Brown LLP ("Mayer Brown"), a law firm, and Joseph P. Collins ("Collins"), a former partner at Mayer Brown. Plaintiffs alleged that defendants violated federal securities laws in the course of representing the now-bankrupt brokerage firm Refco Inc. ("Refco"). Specifically, they claimed that defendants (1) facilitated fraudulent transactions between Refco and third parties for the purpose of concealing Refco's uncollectible debt and (2) drafted portions of Refco's security offering documents that contained false information. Although defendants allegedly created false statements that investors relied upon, all of those statements were attributed to Refco, and not Mayer Brown or Collins, at the time of dissemination.

We hold that a secondary actor[1] can be held liable in a private damages action brought pursuant to Rule 10b-

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[1] We use the term "secondary actor" to refer to lawyers (such as defendants), accountants, or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud. *See Stoneridge*, 552 U.S. at 166 (using the term "[s]econdary actors" to refer to an issuing firm's customers and suppliers); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (characterizing "lawyer[s], accountant[s], or bank[s]" as "secondary actors").

5(b) only for false statements attributed to the secondary-actor defendant at the time of dissemination. Absent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud. We further hold that plaintiffs' claims that defendants participated in a scheme to defraud investors are not meaningfully distinguishable from the claim at issue in *Stoneridge*, and therefore were properly dismissed.

BACKGROUND

In reviewing the District Court's dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true the following nonconclusory allegations set forth in plaintiffs' Second Amended Complaint. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *South Cherry Street, LLC v. Hennessee Group LLC*, 573 F.3d 98, 100 (2d Cir. 2009). This case arises from the 2005 collapse of Refco, which was once one of the world's largest providers of brokerage and clearing services in the international derivatives, currency, and futures markets. According to plaintiffs, Mayer Brown served as Refco's primary outside counsel from 1994 until the company's collapse. Collins, a partner at Mayer Brown, was the firm's primary contact with Refco and the billing partner in charge of the Refco account. Refco was a lucrative client for Mayer Brown and Collins' largest personal client.

Appendix A

As part of its business model, Refco extended credit to its customers so that they could trade on "margin"—*i.e.*, trade in securities with money borrowed from Refco. In the late 1990s, Refco customers suffered massive trading losses and consequently were unable to repay hundreds of millions of dollars of margin loans extended by Refco. Concerned that properly accounting for these debts as "write-offs" would threaten the company's survival, Refco, allegedly with the help of defendants, arranged a series of sham transactions designed to conceal the losses.

Specifically, plaintiffs allege that Refco transferred its uncollectible debts to Refco Group Holdings, Inc. ("RGHI")—an entity controlled by Refco's Chief Executive Officer—in exchange for a receivable purportedly owed from RGHI to Refco. Recognizing that a large debt owed to it by a related entity would arouse suspicion with investors and regulators, Refco, allegedly with the help of defendants, engaged in a series of sham loan transactions at the end of each quarter and each fiscal year to pay off the RGHI receivable. It did so by loaning money to third parties, who then loaned the same amount to RGHI, which in turn used the funds to pay off Refco's receivable. Days after the fiscal period closed, all of the loans were repaid and the third parties were paid a fee for their participation in the scheme. The result of these circular transactions was that, at the end of financial periods, Refco reported receivables owed to it by various third parties rather than the related entity RGHI.

Appendix A

Mayer Brown and Collins participated in seventeen of these sham loan transactions between 2000 and 2005, representing both Refco and RGHI. According to plaintiffs, defendants' involvement included negotiating the terms of the loans, drafting and revising the documents relating to the loans, transmitting the documents to the participants, and retaining custody of and distributing the executed copies of the documents.

Plaintiffs also allege that defendants are responsible for false statements appearing in three Refco documents: (1) an Offering Memorandum for an unregistered bond offering in July 2004 ("Offering Memorandum"), (2) a Registration Statement for a subsequent registered bond offering ("Registration Statement"), and (3) a Registration Statement for Refco's initial public offering of common stock in August 2005 ("IPO Registration Statement"). Each of these documents contained false or misleading statements because they failed to disclose the true nature of Refco's financial condition, which had been concealed, in part, through the loan transactions described above.

Defendants allegedly participated in the creation of the false statements contained in each of the documents identified above. Collins and other Mayer Brown attorneys allegedly reviewed and revised portions of the Offering Memorandum and attended drafting sessions. Collins and another Mayer Brown attorney also personally drafted the Management Discussion & Analysis ("MD&A") portion of the Offering Memorandum, which, according to plaintiffs, discussed

Refco's business and financial condition in a way that defendants knew to be false. The Offering Memorandum was used as the foundation for the Registration Statement, which was substantially similar in content. According to plaintiffs, defendants further assisted in the preparation of the Registration Statement by reviewing comment letters from the Securities and Exchange Commission ("SEC") and participating in drafting sessions. Finally, plaintiffs allege that defendants were directly involved in reviewing and drafting the IPO Registration Statement because they received, and presumably reviewed, the SEC's comments on that filing.

Both the Offering Memorandum and the IPO Registration Statement note that Mayer Brown represented Refco in connection with those transactions. The Registration Statement does not mention Mayer Brown. None of the documents specifically attribute any of the information contained therein to Mayer Brown or Collins.

Plaintiffs, who purchased securities from Refco during the period that defendants were allegedly engaging in fraud, commenced this action after Refco declared bankruptcy in 2005. They asserted claims for violation of § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, along with claims for "control person" liability under § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a).

The District Court dismissed plaintiffs' claims against Mayer Brown and Collins pursuant to Fed. R.

Civ. P. 12(b)(6). *See In re Refco, Inc. Secs. Litig.*, 609 F. Supp. 2d 304 (S.D.N.Y. 2009). With respect to plaintiffs' claim that defendants violated Rule 10b-5(b) by drafting and revising portions of Refco's public documents, the Court found that no statements in those documents were attributed to defendants and that plaintiffs had therefore alleged conduct akin to aiding and abetting, for which securities laws provide no private right of action. *See id.* at 311-14. The District Court also dismissed plaintiffs' Rule 10b-5(a) and (c) claims for "scheme liability" upon concluding that the Supreme Court's decision in *Stoneridge* foreclosed that theory of liability. *See id.* at 314-19. Finally, the District Court dismissed plaintiffs' § 20(a) claims because plaintiffs failed adequately to plead an underlying violation of federal securities law. *See id.* at 319.

DISCUSSION

We review *de novo* a District Court's dismissal for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), assuming all well-pleaded, nonconclusory factual allegations in the complaint to be true. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009).

This appeal concerns the scope of the private right of action available under § 10(b) of the Exchange Act and Rule 10b-5 (hereinafter, "Rule 10b-5 liability"). Section 10(b) makes it unlawful "for any person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of any security . . ., any manipulative

or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5, promulgated thereunder, provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

Appendix A

17 C.F.R. § 240.10b-5.

The Supreme Court has held that, to maintain a private damages action under § 10(b) and Rule 10b-5,

> a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Stoneridge, 552 U.S. at 157 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)).

This appeal raises primarily two issues regarding the scope of Rule 10b-5 liability in private actions: (1) whether defendants can be liable under Rule 10b-5(b) for false statements that they allegedly drafted, but which were not attributed to them at the time the statements were disseminated; and (2) whether the allegations in the complaint are sufficient to state a claim for "scheme liability" under Rule 10b-5(a) and (c).[2]

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[2] We emphasize that nothing in this opinion limits the scope of liability with respect to government enforcement actions, whether civil or criminal in nature. This opinion relates only to actions under Rule 10b-5 brought by private individuals.

Appendix A

I. Plaintiffs' Rule 10b-5(b) Claim

Plaintiffs assert that the District Court erred in holding that attorneys who participate in the drafting of false statements cannot be liable in a private damages action if the statements are not attributed to those attorneys at the time of dissemination. Along with the SEC as *amicus curiae*, plaintiffs argue that attribution is only one means by which attorneys and other secondary actors can incur liability for securities fraud. They urge us to adopt a "creator standard" and hold that a defendant can be liable for *creating* a false statement that investors rely on, regardless of whether that statement is attributed to the defendant at the time of dissemination. According to the SEC, "[a] person creates a statement . . . if the statement [1] is written or spoken by him, or [2] if he provides the false or misleading information that another person then puts into the statement, or [3] if he allows the statement to be attributed to him." Brief for SEC as Amicus Curiae Supporting Plaintiffs-Appellants ("SEC Br.") at 7.[3]

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[3] Although the SEC urges us to adopt a so-called "creator standard," it takes no position on whether the allegations in the complaint are sufficient to maintain a cause of action under that standard against Mayer Brown or Collins. SEC Br. at 5. We note at the outset that the SEC's views on the scope of the *judicially created* implied right of action available under § 10(b) and Rule 10b-5 are entitled to little or no deference. *See Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 (1977) ("[The SEC's] presumed 'expertise' in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular

(Cont'd)

Defendants respond that, under our precedents, attorneys who participate in the drafting of false statements cannot be liable absent explicit attribution at the time of dissemination. Without attribution, defendants contend, secondary actors do not commit a primary violation of Rule 10b-5(b) and their conduct amounts, at most, to aiding and abetting.

Analyzing the parties' claims requires a brief history of the attribution requirement in our Circuit. Although we have often held that attribution is required for secondary actors to incur liability, we have for certain other defendants imposed no attribution requirement. *Compare Wright v. Ernst & Young LLP*, 152 F.3d 169, 174-75 (2d Cir. 1998) (requiring attribution for outside accountant defendants), and *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 155 (2d Cir. 2007) (same), with *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir. 2001) (not requiring attribution for corporate insider defendant). Upon reviewing this history and the guidance provided by the Supreme Court, we conclude that attribution is required for secondary actors to be liable in a private damages action for securities fraud under Rule 10b-5.

(Cont'd)
class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in the particular case.").

Appendix A

A. History of the Attribution Requirement

The distinction between primary liability under Rule 10b-5 and aiding and abetting became especially important after the Supreme Court's 1994 decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). That case involved the issuance of bonds by a public building authority and plaintiffs' allegations that Central Bank of Denver, the indenture trustee for the bond issues, aided and abetted the issuer in committing securities fraud by agreeing to delay an independent appraisal of the real property securing the bonds. *Id.* at 167-68. After reviewing the text and history of § 10(b), the Supreme Court concluded that "the 1934 [Exchange Act] does not itself reach those who aid and abet a § 10(b) violation." *Id.* at 177. To hold otherwise, it explained, would be to "impose . . . liability when at least one element critical for recovery under 10b-5 is absent: reliance." *Id.* at 180.

Despite holding that Rule 10b-5 liability does not extend to aiders and abettors, the Supreme Court acknowledged that "secondary actors" could, in some circumstances, still be liable for fraudulent conduct. *Id.* at 191. Specifically, the Court explained that

> [a]ny person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5,

> assuming *all* of the requirements for primary liability under Rule 10b-5 are met. In any complex securities fraud, moreover, there are likely to be multiple violators . . . .

Id. (citation omitted).

We considered the effect of *Central Bank* on private securities litigation against secondary actors in *Shapiro v. Cantor*, 123 F.3d 717 (2d Cir. 1997). *Shapiro* involved claims against the accounting firm Deloitte & Touche and its predecessor-in-interest for alleged complicity in the deceptive conduct of a limited partnership. *Id.* at 718-19. We held that plaintiffs failed to state a claim for a primary violation of securities laws against Deloitte & Touche because

> [a]llegations of "assisting," "participating in," "complicity in" and similar synonyms used throughout the complaint all fall within the prohibitive bar of *Central Bank*. A claim under § 10(b) must allege a defendant has made a material misstatement or omission indicating an intent to deceive or defraud in connection with the purchase or sale of a security.

Id. at 720-21 (footnote omitted); *see also id.* at 720 ("[I]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not

enough to trigger liability under *Section 10(b)*." (quoting *In re MTC Elec. Techs. Shareholders Litig.*, 898 F. Supp. 974, 987 (E.D.N.Y. 1995))).

The principle that *Central Bank* requires the attribution of false statements to the defendant at the time of dissemination first appeared in our 1998 decision in *Wright v. Ernst & Young LLP*, 152 F.3d at 175. Wright involved claims against the accounting firm Ernst & Young and allegations that the firm orally approved a corporation's false and misleading financial statements, which were subsequently disseminated to the public. *Id.* at 171.

We explained that, after *Central Bank*, courts had generally adopted either a "bright line" test or a "substantial participation" test to distinguish between primary violations of Rule 10b-5 and aiding and abetting:

> "Some courts have held that a third party's review and approval of documents containing fraudulent statements is not actionable under Section 10(b) because one must make the material misstatement or omission in order to be a primary violator. *See, e.g., In re Kendall Square Research Corporation Securities Litigation*, 868 F. Supp. 26, 28 (D. Mass. 1994) (accountant's 'review and approval' of financial statements and prospectuses insufficient); *Vosgerichian v. Commodore International*, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (allegations that

> accountant 'advised' and 'guid[ed]' client in making allegedly fraudulent misrepresentations insufficient).
>
> Other courts have held that third parties may be primarily liable for statements made by others in which the defendant had significant participation. *See, e.g., In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (accountant may be primarily liable based on its 'significant role in drafting and editing' a letter sent by the issuer to the SEC); *In re ZZZZ Best Securities Litigation*, 864 F. Supp. 960, 970 (C.D. Cal. 1994) (an accounting firm that was 'intricately involved' in the creation of false documents and their 'resulting deception' is a primary violator of section 10(b))."

Id. at 174-75 (quoting *MTC Elec.*, 898 F. Supp. at 986) (alterations omitted). We noted that, in *Shapiro*, we had followed the "bright line" approach. *Id.* We therefore held that "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement not attributed to that actor at the time of its dissemination." *Id. Wright* also made clear that attribution is necessary to satisfy the reliance element of a private damages action under Rule 10b-5. *Id.* ("Reliance only on representations made by others cannot itself form the basis of liability." (alteration and internal quotation marks omitted)). Because the misrepresentations on which plaintiffs' claims were based were not attributed

to Ernst & Young, we held that the complaint failed to state a claim under Rule 10b-5. *Id.*

Despite *Wright's* seemingly clear requirement that false statements be attributed to the defendant, our subsequent decisions may have created uncertainty or ambiguity with respect to when attribution is required. In 2001, in *In re Scholastic Corp. Securities Litigation*, we held that a corporate officer could be liable for misrepresentations made by the corporation, notwithstanding the fact that none of the statements at issue were specifically attributed to him. 252 F.3d at 75-76. We explained that as "vice president for finance and investor relations" the defendant "was primarily responsible for Scholastic's communications with investors and industry analysts. He was involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements issued by Scholastic during the class period." *Id.* On that basis, we allowed plaintiffs' claims against the defendant to proceed. Our opinion in *Scholastic* did not rely on, or even cite, *Wright* or *Central Bank* and contained no discussion of the distinction between primary violations of Rule 10b-5 and aiding and abetting.

Since *Scholastic*, district courts in our Circuit have struggled to reconcile its holding with our earlier holding in *Wright*. *See, e.g., In re Warnaco Group, Inc. Sec. Litig.*, 388 F. Supp. 2d 307, 314-15 n.3 (S.D.N.Y. 2005) (distinguishing *Scholastic* from *Wright* on the ground that the former involved "a corporate insider rather than an outside actor"), *aff'd sub nom.*

Lattanzio, 476 F.3d 147; *Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 331 (S.D.N.Y. 2004) (Lynch, J.) (discussing the tension between *Wright* and *Scholastic* and noting that "*Scholastic* might indicate some relaxation of *Wright's* [attribution] requirement"). Several of our decisions have also held that corporate officers can be liable for false information provided to and disseminated by analysts, even if no statements are attributed to the corporate officers themselves. *See Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). Like *Scholastic*, these cases did not cite *Wright* or *Central Bank*.

Notwithstanding this uncertainty we recently confirmed the importance of attribution for claims against secondary actors. In 2007, in *Lattanzio v. Deloitte & Touche*, we considered claims that the accounting firm Deloitte & Touche had, *inter alia*, reviewed and approved false or misleading quarterly statements issued by a public company. 476 F.3d at 151-52. We held that "to state a § 10b claim against an issuer's accountant, a plaintiff must allege a misstatement that is attributed to the accountant 'at the time of its dissemination,' and cannot rely on the accountant's alleged assistance in the drafting or compilation of a filing." *Id.* at 153 (quoting *Wright*, 152 F.3d at 174). We explained that imposing liability on accountants who review and approve misleading statements would be contrary to *Wright's* rejection of the "substantial participation" test. *Id.* at 155. Because the claims against Deloitte & Touche were not based on the "accountant's

articulated statement," we held that Rule 10b-5 liability did not extend to the defendants. *Id.* at 154 ("Under *Central Bank*, Deloitte is not liable for merely assisting in the *drafting* and filing of the quarterly statements." (emphasis added)).

B. Creator Standard v. Attribution Standard

Plaintiffs and the SEC urge us to adopt a "creator" standard that would require us to hold that a defendant can be liable for *creating* a false statement that investors rely on, regardless of whether that statement is attributed to the defendant at the time of dissemination. They argue that their proposed standard is consistent with the law of the Circuit. They distinguish *Wright* and *Lattanzio* on the ground that the defendants in those cases were not alleged to have created the false statements in question, but rather, merely reviewed false statements created by others. Plaintiffs and the SEC contend that, notwithstanding the broad language that suggests attribution is always required, these cases are best read as holding that a defendant can be liable if he or she creates a false or misleading statement *or* allows a false statement to be attributed to him or her. Their position finds some support in *dicta* from one of our recent cases. *See United States v. Finnerty*, 533 F.3d 143, 150 (2d Cir. 2008) (describing *Wright* as holding that "under *Central Bank*, a defendant 'cannot incur primary liability' for a statement neither made by him *nor* 'attributed to [him] at the time of its dissemination'" (emphasis added) (quoting *Wright*, 152 F.3d at 175)).

Notwithstanding the *dicta* in *United States v. Finnerty*, we reject the creator standard for secondary actor liability under Rule 10b-5. An attribution requirement is more consistent with the Supreme Court's guidance on the question of secondary actor liability. Furthermore, a creator standard is indistinguishable from the "substantial participation" test that we have disavowed since *Wright*, and it is incompatible with our stated preference for a "bright line" rule. *See Wright*, 152 F.3d at 175.

Accordingly, secondary actors can be liable in a private action under Rule 10b-5 for only those statements that are explicitly attributed to them. The mere identification of a secondary actor as being involved in a transaction, or the public's understanding that a secondary actor "is at work behind the scenes" are alone insufficient. *See Lattanzio*, 476 F.3d at 155. To be cognizable, a plaintiff's claim against a secondary actor must be based on that actor's own "articulated statement," or on statements made by another that have been *explicitly* adopted by the secondary actor. *See id.*

1. Attribution Is Consistent with *Stoneridge*

The Supreme Court has never directly addressed whether attribution at the time of dissemination is required for secondary actors to be liable in a private damages action brought pursuant to Rule 10b-5. Nevertheless, the Court's recent decision in *Stoneridge* is instructive.

The Supreme Court's focus on reliance in *Stoneridge* favors a rule, such as attribution, that is designed to preserve that element of the private right of action available under Rule 10b-5. *See Wright*, 152 F.3d at 175 (noting that an attribution requirement prevents plaintiffs from "circumvent[ing] the reliance requirements of the [Exchange] Act"). In *Stoneridge*, which dealt primarily with deceptive conduct rather than false statements, the Court rejected claims brought pursuant to Rule 10b-5 against an issuing firm's customers and suppliers. 552 U.S. at 153. The Court held that plaintiffs' claims failed as a matter of law because plaintiffs could not demonstrate that they "rel[ied] upon [defendants'] *own* deceptive conduct" and because "[i]t was [the issuing firm] Charter, not [defendants], that misled its auditor and filed fraudulent financial statements." *Id.* at 160-61 (emphasis added); *id.* at 159 ("Reliance by the plaintiff upon *the defendant's* deceptive acts is an essential element of the § 10b private cause of action." (emphasis added)). We think that reasoning is consistent with an attribution requirement in the context of claims based on false statements. If a plaintiff must rely on a secondary actor's *own* deceptive conduct to state a claim under Rule 10b-5(a) and (c), it stands to reason that a plaintiff must also rely on a secondary actor's *own* deceptive statements—and not on statements conveyed to the public through another source and not attributed to the defendant—to state a claim under Rule 10b-5(b).

More generally, *Stoneridge* stands for the proposition that reliance is the critical element in private

actions under Rule 10b-5. This general proposition, applied to the specific issue of secondary actor liability, further supports an attribution requirement. Attribution is necessary to show reliance. Where statements are publicly attributed to a well-known national law or accounting firm, buyers and sellers of securities (and the market generally) are more likely to credit the accuracy of those statements. Because of the firm's imprimatur, individuals may be comforted by the supposedly impartial assessment and, accordingly, be induced to purchase a particular security. Without explicit attribution to the firm, however, reliance on that firm's participation can only be shown through "an indirect chain . . . too remote for liability." *Stoneridge*, 552 U.S. at 159.

2. Attribution Is Consistent with Our "Bright Line" Approach

The creator standard championed by plaintiffs and the SEC cannot be reconciled with our unambiguous rejection of a "substantial participation" test in favor of a bright line rule. In *Wright*, we noted that some courts applying a substantial participation test had imposed liability on secondary actors based on their "significant role in *drafting* and editing" false documents or their "'intricate[ ] involv[ment]' in the *creation* of false documents." *See Wright*, 152 F.3d at 175 (emphases added) (quoting a district court's description of *In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) and *In re ZZZZ Best Securities Litigation*, 864 F. Supp. 960, 970 (C.D. Cal. 1994)). We went on to explain,

however, that the Second Circuit had rejected a substantial participation test in favor of a bright line rule. *Id.*

A creator standard is effectively indistinguishable from a substantial participation test. According to the SEC, the creator standard would extend liability to secondary actors who "supplied the writer with false or misleading information" or "'caused' a false or misleading statement to be made"—even if the statement disseminated to the public made no mention of the defendant. SEC Br. at 7, 10.[4] As we explained in *Lattanzio*, however, a "[p]ublic understanding that [a secondary actor] is at work behind the scenes does not create an exception to the requirement that an actionable misstatement be made by the [secondary actor]" and "[u]nless the public's understanding is based on the [secondary actor's] *articulated statement*, the source for that understanding . . . does not matter." 476 F.3d at 155 (emphasis added). Insofar as a creator standard would impose liability on secondary actors, such as defendants here, for their role in drafting and editing false documents on behalf of an issuing firm, it would mark a radical departure from our precedents.

An attribution requirement, on the other hand, is consistent with our preference for a bright line rule

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[4] In many circumstances a creator standard would be even *less* rigorous than the substantial participation test, insofar as a defendant could incur liability for almost *any* involvement in the creation of false statements, not merely "substantial," "significant," or "intricate" involvement.

distinguishing primary violations of Rule 10b-5 from aiding and abetting. *See Wright*, 152 F.3d at 175 (explaining that, "[i]n *Shapiro*, we followed the 'bright line' test"). An attribution requirement makes clear—to secondary actors and investors alike—that those who sign or otherwise allow a statement to be attributed to them expose themselves to liability. Those who do not are beyond the reach of Rule 10b-5's private right of action. A creator standard establishes no clear boundary between primary violators and aiders and abettors, and it is uncertain what level of involvement might expose an individual to liability. Even the SEC struggles to define the precise contours of the creator standard, noting that a person "would *arguably* not cause a misstatement where he merely gave advice to another person regarding what was required to be disclosed and then that person made an independent choice to follow the advice." SEC Br. at 10-11 (emphasis added).

A bright line rule such as an attribution requirement also has many benefits in application. An attribution requirement is relatively easy for district courts to apply and avoids protracted litigation and discovery aimed at learning the identity of each person or entity that had some connection, however tenuous, to the creation of an allegedly false statement. Furthermore, as the Supreme Court has explained, securities law is "an area that demands certainty and predictability." *Central Bank*, 511 U.S. at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). Uncertainty can lead to many undesirable consequences, "[f]or example, newer and smaller companies may find it difficult to obtain advice

from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others." *Id.* at 189. Uncertainty also increases the costs of doing business and raising capital. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) (describing "the need to avoid overbroad and amorphous doctrine and to craft legal rules with *bright lines* as a means of reducing the cost of capital" and explaining that "[o]verbreadth and uncertainty deter beneficial conduct and breed costly litigation" (emphasis added)), *cited with approval in Central Bank*, 511 U.S. at 189[5]; *see also Central Bank*, 511 U.S. at 188 ("[A] shifting and highly fact-oriented disposition of the issue of who may be liable for a damages claim for violation of Rule 10b-5 is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions." (internal quotation marks and brackets omitted)). A creator standard would inevitably lead to uncertainty regarding the scope of Rule 10b-5 liability and potentially deter beneficial conduct. *See* Winter, *ante*, at 963 ("[O]verdeterrence in regulating capital markets . . . will deter activity that we wish to encourage.").

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[5] Judge Winter has explained that prosecutors and regulators (including the SEC) have often favored rules that "would have rendered capital markets less, rather than more, efficient." *See* Winter, *ante*, at 962 (explaining that "[t]he culture of prosecutors in these areas of law is to seek rules that are palpably overbroad so that they have a broad arsenal of weapons to use against suspected wrongdoers").

For the foregoing reasons, we conclude that even if *Wright* and *Lattanzio* were not read explicitly to require attribution in every case, an attribution requirement is most consistent with our Circuit's preference for a bright line approach to the question of secondary actor liability. Accordingly, we reject the creator standard advanced by plaintiffs and the SEC and we reaffirm our jurisprudence in *Wright* and *Lattanzio*—namely, that "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement not attributed to that actor at the time of its dissemination." *Wright*, 152 F.3d at 175; *see Lattanzio*, 476 F.3d at 154 ("Under *Central Bank*, [a secondary actor] is not liable for merely assisting in the drafting and filing of [allegedly false statements].").[6]

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[6] Because this appeal does not involve claims against corporate insiders, we intimate no view on whether attribution is required for such claims or whether *Scholastic* can be meaningfully distinguished from *Wright* and *Lattanzio*. There may be a justifiable basis for holding that investors rely on the role corporate executives play in issuing public statements even in the absence of explicit attribution. *Lattanzio* confirmed, however, that, at least with respect to secondary actor liability, *Scholastic* did not relax *Wright's* attribution requirement. *See Lattanzio*, 476 F.3d at 155 ("Public understanding that an accountant is at work behind the scenes does not create an exception to the requirement that an actionable misstatement be made by the accountant. Unless the public's understanding is based on the accountant's *articulated statement*, the source for that understanding . . . does not matter." (footnote omitted) (emphasis added)).

C. Application of the Attribution Requirement

Applying the attribution standard to the alleged false and misleading statements in this case, we conclude that the District Court properly dismissed plaintiffs' Rule 10b-5(b) claims against Mayer Brown and Collins. No statements in the Offering Memorandum, the Registration Statement, or the IPO Registration Statement are attributed to Collins, and he is not even mentioned by name in any of those documents. Accordingly, plaintiffs cannot show reliance on any of Collins' statements. *See Lattanzio*, 476 F.3d at 154; *Wright*, 152 F.3d at 175 (imposing liability on secondary actors absent attribution "would circumvent the reliance requirement of [§ 10b]").

The Offering Memorandum and the IPO Registration Statement note that Mayer Brown, among other counsel, represented Refco in connection with those transactions but neither document attributes any particular statements to Mayer Brown. Mayer Brown is not identified as the author of any portion of the documents. Nor can the mere mention of the firm's representation of Refco be considered an "articulated statement" by Mayer Brown adopting Refco's statements as its own. *See Lattanzio*, 476 F.3d at 155. Absent such attribution, plaintiffs cannot show reliance on any statements of Mayer Brown. *See id.* at 154; *Wright*, 152 F.3d at 175.

II. Plaintiffs' Rule 10b-5(a) and (c) Claims ("Scheme Liability")

The District Court dismissed plaintiffs' Rule 10b-5(a) and (c) claims on the ground that the Supreme Court's decision in *Stoneridge* foreclosed plaintiffs' theory of "scheme liability." We agree with the District Court and we adopt its careful analysis of plaintiffs' claims brought pursuant to Rule 10b-5(a) and (c). *See In re Refco*, 609 F. Supp. 2d at 314-19.

In *Stoneridge*, plaintiffs sought to hold two companies liable for their participation in sham transactions that allowed an issuer of securities to overstate its revenue. 552 U.S. at 153-55. Although the defendants' conduct was deceptive and enabled the issuer to conceal the misrepresentations in its financial statements, the Supreme Court found that the essential element of reliance was absent. *Id.* at 159. It explained that

> [defendants'] deceptive acts were not communicated to the public. No member of the investing public had knowledge, either actual or presumed, of [defendants'] deceptive acts during the relevant times. [Plaintiffs], as a result, cannot show reliance upon any of [defendants'] actions except in an indirect chain that we find too remote for liability.

Id.; *see also id.* at 161 ("It was Charter, not [defendants], that misled its auditor and filed fraudulent financial

statements; nothing [defendants] did made it necessary or inevitable for Charter to record the transactions as it did.").

Like the defendants in *Stoneridge*, Mayer Brown and Collins are alleged to have facilitated sham transactions that enabled Refco to conceal the true state of its financial condition from investors. As in *Stoneridge*, plaintiffs were not aware of those transactions and, in fact, plaintiffs explicitly disclaim any knowledge of defendants' involvement. Confidential J.A. 300 ("In ignorance of the fraudulent conduct of Collins [and] Mayer Brown . . . Plaintiffs and the other members of the Class purchased Refco securities . . . ."). Accordingly, as the District Court explained, plaintiffs "did not rely on[ ] any of Mayer Brown's work on the fraudulent loan transactions" and they failed to state a claim for primary liability under Rule 10b-5. *In re Refco*, 609 F. Supp. 2d at 315.

Plaintiffs attempt to distinguish *Stoneridge* by arguing that (1) defendants' deceptive conduct was communicated to the public; (2) defendants' conduct made it "necessary or inevitable" that Refco would misstate its finances, *see Stoneridge*, 552 U.S. at 161; and (3) defendants' conduct occurred in the "investment sphere," *see id.* at 166 (noting that the deceptive transactions "took place in the marketplace for goods and services, not in the investment sphere"). None of these purported distinctions is persuasive.

As explained above, plaintiffs admit that they were unaware of defendants' deceptive conduct or "scheme"

at the time they purchased Refco securities. Under *Stoneridge*, it does not matter that those transactions were "reflected" in Refco's financial statements. 552 U.S. at 160. The Supreme Court explicitly rejected the argument that "investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect." *Id.* (noting that "there is no authority for this rule"). Accordingly, the fact that the sham transactions (or "scheme") allegedly facilitated by Mayer Brown and Collins rendered Refco's public financial disclosures false or misleading does not materially distinguish this case from *Stoneridge*.[7]

We recognize that, after *Stoneridge*, it is somewhat unclear how the deceptive conduct of a secondary actor could be communicated to the public and yet remain "deceptive." What is clear from *Stoneridge*, however, is that the mere fact that the ultimate result of a secondary actor's deceptive course of conduct is communicated to the public through a company's financial statements is insufficient to show reliance on the secondary actor's *own* deceptive conduct. Because that is all plaintiffs have alleged here, we are bound by the Supreme Court's holding in *Stoneridge*.

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[7] Nor does the fact that defendants allegedly drafted those disclosures alter the analysis. As explained above, none of Refco's allegedly false statements was attributed to Mayer Brown or Collins. Defendants' role in preparing those documents therefore adds nothing to plaintiffs' claim of reliance.

Furthermore, nothing about Mayer Brown's or Collins' actions made it necessary or inevitable that Refco would mislead investors. As the District Court aptly noted, unlike in *Stoneridge*, "the Mayer Brown Defendants were not even the counter-party to the fraudulent transactions; they merely participated in drafting the documents to effect those transactions." *In re Refco*, 609 F. Supp. 2d at 316. We therefore agree that, "[a]s was the case in *Stoneridge*, it was Refco, not the Mayer Brown Defendants, that filed fraudulent financial statements; nothing the Mayer Brown Defendants did made it necessary or inevitable for Refco to record the transactions as it did." *Id.* (quoting *Stoneridge*, 552 U.S. at 160) (internal quotation marks, brackets, and ellipsis omitted).

Finally, the fact that defendants' conduct arguably occurred in the "investment sphere" is not dispositive or materially relevant. Although *Stoneridge* acknowledged the dangers of expanding liability to "the whole marketplace in which the issuing company does business," 552 U.S. at 160, the Court's opinion was primarily focused on whether investors were aware of, and relied on, the defendants' own conduct. This understanding is consistent with our recent opinion in *United States v. Finnerty*, which relied on *Stoneridge* to hold that a securities professional—a specialist trader on the New York Stock Exchange—could not be liable under § 10(b) absent some evidence that he conveyed a misleading impression to customers. 533 F.3d at 149. *Finnerty* undermines any assertion that *Stoneridge* is inapplicable to conduct that occurs in the "investment sphere."

For the foregoing reasons, we agree with the District Court that plaintiffs' Rule 10b-5(a) and (c) claims for "scheme liability" are foreclosed by the Supreme Court's decision in *Stoneridge*.

III. Section 20(a) Liability

Any claim for "control person" liability under § 20(a) of the Exchange Act[8] must be predicated on a primary violation of securities law. 15 U.S.C. § 78t(a) (imposing liability on those who "control[ ] any person liable" for securities fraud); *see, e.g.*, *Rombach*, 355 F.3d at 177-78. Because we hold that plaintiffs failed to state a claim for a primary violation against the defendants, we also hold that the District Court properly dismissed their § 20(a) claim against Mayer Brown.

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[8] Section 20(a) provides as follows:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a).

IV. Plaintiffs' Request for Leave to Amend

For the first time on appeal, plaintiffs request the opportunity to amend their complaint to include facts discovered since their original complaint was filed. Plaintiffs do not disclose to us those recently discovered facts and there is therefore no basis for suggesting, much less concluding, that plaintiffs could amend their claims against Mayer Brown and Collins in a way that would make them viable. *See Nat'l Union of Hosp. & Health Care Employees v. Carey*, 557 F.2d 278, 282 (2d Cir. 1977) ("Absent some indication as to what appellants might add to their complaint in order to make it viable, we see no reason to grant appellants relief in this Court which was not requested below." (citation omitted)). Accordingly, we decline to grant plaintiffs leave to amend.

CONCLUSION

To summarize, we hold:

(1) Secondary actors, such as defendants, can be held liable in a private damages action brought pursuant to § 10(b) and Rule 10b-5(b) only for false statements attributed to the secondary actor at the time of dissemination;

(2) Plaintiffs' claims for "scheme liability" brought pursuant to § 10(b) and Rule 10b-5(a) and (c) are foreclosed by the Supreme Court's decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008);

(3) Because plaintiffs cannot establish a primary violation by the defendants, the District Court properly dismissed their claim for "control person" liability under § 20(a) of the Exchange Act; and

(4) Plaintiffs' request for leave to amend their complaint is denied.

Accordingly, the judgment of the District Court is **AFFIRMED**.

CONCUR BY: Barrington D. Parker

CONCUR

Barrington D. Parker, *Circuit Judge*, concurring.

The panel's opinion does an admirable job with a formidable task-distilling a theory of Rule 10(b) liability for secondary actors from our precedents. Therefore, I concur in Judge Cabranes's careful and comprehensive opinion. Nonetheless, even after this opinion, I fear that our Circuit's law in this area is far from a model of clarity. Our decisions in *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), and *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 155-56 (2d Cir. 2007), both hold that secondary actors are not liable to investors where the allegedly misleading statements were not attributed to the defendants. However, after *Wright*, we issued *In Re Scholastic Corp. Securities Litigation*, 252 F.3d 63, 75-76 (2d Cir. 2001), where we concluded that a corporate vice president could be liable for being

"involved" in disseminating misleading statements, without requiring public attribution of the statements to him. It is true that the defendant in *Scholastic Corp.* was a corporate insider, rather than an outside accountant or lawyer. However, the court did not distinguish *Wright* on that basis; indeed, it did not cite *Wright* at all. At least one district court in this Circuit interpreted *Scholastic Corp.* to say that we had relaxed *Wright's* attribution requirement. *See In Re Global Crossing, Ltd. Sec. Lit.*, 322 F. Supp. 2d 319, 331-33 (S.D.N.Y. 2004) (Lynch, *J.*). Subsequently, we reaffirmed a strict attribution requirement in *Lattanzio*, without mentioning *Scholastic Corp.* Finally, in *United States v. Finnerty*, we interpreted *Wright* to mean that a defendant "cannot incur primary liability for a statement neither made by him nor attributed to him at the time of its dissemination," language which one could interpret to suggest that strict attribution is not necessary. 533 F.3d 143, 150 (2d Cir. 2008) (quotation marks omitted).

While our own precedent appears to be not invariably consistent, our sibling circuits have debated sharply whether an attribution requirement is necessary under *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). *Compare Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) *and SEC v. Wolfson*, 539 F.3d 1249, 1258-60 (10th Cir. 2008) (rejecting an attribution requirement) *with Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) (adopting an attribution requirement). In an amicus brief submitted in this case, the SEC takes

the position that a creator standard is fully consistent with *Central Bank of Denver*. Moreover, it argues that an attribution requirement would prevent the securities laws from deterring individuals who make false statements anonymously or through proxies. The SEC also obs·rves that private plaintiffs who bring securities claims already face significant hurdles-they must prove that the defendants knew the falsity of their statements, and as a result of the Private Securities Litigation Reform Act, must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). The Appellants in our case argue with some force against a result that shields Mayer Brown from damages in a circumstance where the partner responsible for the misleading statements was criminally convicted and received a prison term of seven years. *See* Amended Judgment, *United States of America v. Collins*, No. 1:07-cr-01170, 2010 U.S. Dist. LEXIS 19488 (S.D.N.Y. Mar. 3, 2010).

In light of the importance of the existence, *vel non*, of an attribution requirement to the securities laws, the bar, and the securities industry, this case could provide our full Court, as well as, perhaps, the Supreme Court, with an opportunity to clarify the law in this area.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK FILED MARCH 17, 2009

05 Civ. 8626 (GEL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER

In re REFCO, INC. SECURITIES LITIGATION

James J. Sabella, Grant & Eisenhoffer P.A., New York, New York, *for Lead Plaintiff Pacific Investment Management Company LLC and Co-Lead Counsel for the Putative Class.*

John P. Coffey, Bernstein Litowitz Berger & Grossman LLP, New York, New York, *for Lead Plaintiff RH Capitol Associates LLC and Co-Lead Counsel for the Putative Class.*

John K. Villa, George A. Borden, Thomas G. Ward, Williams & Connolly LLP, Washington, D.C., *for Defendant Mayer Brown.*

William J. Schwartz, Cooley Godward Kronish LLP, New York, New York, *for Defendant Joseph P. Collins.*

GERARD E. LYNCH, *District Judge:*

Appendix B

In yet another chapter of this putative class action for securities fraud arising from the collapse of Refco Inc. and its affiliated companies ("Refco"), Joseph P. Collins ("Collins") and Mayer Brown LLP ("Mayer Brown") (the "Mayer Brown Defendants") — move for dismissal of the Second Amended Consolidated Class Action Complaint ("the Complaint") as to them.[1] The core issue before the Court is whether the plaintiff-investors[2] can hold Refco's outside counsel liable for their injury pursuant to §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 78j(b), 78t(a). Although the Complaint alleges facts that, if true, would make the Mayer Brown Defendants guilty of aiding and abetting the securities fraud that harmed the plaintiffs, the Supreme Court and Congress have declined to provide a private right of action for victims of securities fraud against those who merely — if otherwise substantially and culpably — aid a fraud that is executed by others. Accordingly, the motions to dismiss must be granted.

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[1] The Complaint added Mayer Brown and Collins as defendants and incorporated the allegations made in a separate complaint filed in this Court on October 1, 2007, under the caption *RH Capital Associates LLC, et al. v. Mayer Brown LLP, et al.*

[2] In an order dated February 8, 2006 (Doc. # 63), the Court appointed RH Capital Associates LLC ("RH Capital") and Pacific Investment Management Company LLC ("PIMCO") as lead plaintiffs pursuant to 15 U.S.C. § 78u-4(a)(3)(B) and 15 U.S.C. § 77z-1(a)(3).

Appendix B

BACKGROUND

The factual background of the fraudulent scheme to deceive investors and others about the true financial circumstances of the international brokerage firm Refco Inc. and its affiliated companies is set forth in detail in the Court's prior opinion in *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 618-20 (S.D.N.Y. 2007), and in any number of additional opinions,[3] but the details will be repeated here to the extent that they are relevant. In reviewing a dismissal pursuant to Fed. R. Civ. P. 12(b)(6), plaintiffs' allegations are assumed to be true for purposes of deciding the motion. *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 151 (2d Cir. 2007).

I. *The Alleged Fraudulent Scheme*

Prior to Refco's spectacular collapse, it was among the world's largest providers of brokerage and clearing services in the international derivatives, currency, and futures markets. Refco's business model involved extending credit to its customers so that they could trade on margin and leverage their capital into larger trades, for which Refco could again extend credit. (Compl. ¶ 2.) These trades generated substantial commissions,

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[3] *See, e.g., Thomas H. Lee Equity Fund V, L.P. v. Grant Thornton LLP*, No. 07 Civ. 8663, 2008 WL 3166536, at *1-2 (S.D.N.Y. Aug. 6, 2008); *In re Refco Capital Markets, Ltd. Brokerage Customers Sec. Litig.*, No. 06 Civ. 643, 2007 WL 2694469, at *4 (S.D.N.Y. Sept. 13, 2007); *American Financial Int'l Group-Asia, L.L.C. v. Bennett*, No. 05 Civ. 8988, 2007 WL 1732427, at *1 (S.D.N.Y. June 14, 2007).

revenues, and profits for Refco, but over time Refco began making loans without adequately assessing customers' credit-worthiness or the risks associated with their trading activities. (Compl. ¶¶ 428-30.) These lapses began to have consequences in the late nineties, when several global financial crises caused a number of customers to suffer massive trading losses. (Compl. ¶¶ 3, 431-35.) The loans now became "uncollectible receivables" that Refco's customers were unwilling or unable to repay.

Rather than write off or disclose these uncollectible receivables — the revelation of which would have had dire financial consequences for the company (Compl. ¶¶ 426, 579-80) — Refco's management allegedly devised a scheme to conceal them from the public and Refco's investors. (Compl. ¶ 3.) First, they transferred the loans onto the books of Refco Group Holdings, Inc. ("RGHI"), an entity owned and controlled by Phillip R. Bennett ("Bennett"), Refco's President, CEO, and Chairman. (Compl. ¶¶ 3, 33.) As a result of these transfers, RGHI owed hundreds of millions of dollars to Refco, but RGHI had no liquid assets and no operational functions (Compl. ¶¶ 31, 638), and thus it had no conceivable means of repaying the "loans." (Compl. ¶ 3.)

Next, to avoid the disclosure of large "related-party" receivables — the sum of which dwarfed Refco's net income — a series of fraudulent transactions were arranged by which the RGHI receivables were periodically made to disappear from Refco's books through so-called "round-trip loans" in which the

receivables owed to Refco from RGHI were replaced with receivables purportedly owed by a third-party customer. (Compl. ¶¶ 3, 450-51, 627.)

These loans, which straddled the end of each fiscal year from 2000 through 2005 and at the end of several fiscal quarters as well, all worked in essentially the same way. (Compl. ¶ 451.) First, several days before Refco closed its books for each financial period, Refco Capital Markets Ltd. ("RCM"), a Refco subsidiary, would loan hundreds of millions of dollars to a third-party customer who then, through its account at Refco, simultaneously loaned the same amount to RGHI. (*Id.*) The loan agreements between the third party and RCM — which were done on a book basis (the principal never changed hands) — were meticulously structured so that they were essentially risk-free to the third-party customers; the customers' loans to RGHI were guaranteed by Refco and the customers profited for their participation in the "loans" through interest earned on their loans to RGHI, which by design exceeded the interest they were charged by RCM.[4] (Compl. ¶¶ 451, 633.) RGHI, in turn, used the loans from the customers to pay down the money it owed to Refco for its uncollectible receivables. (*Id.*) The net effect of these transactions was that at

[4] Although the third parties purportedly earned interest from RGHI, the payment of the difference in interest was made by RCM. (Compl. ¶ 451, 632.) In effect, RCM paid the interest on a loan extended by a customer to a purportedly separate entity, RGHI. (Compl. ¶ 632.) This payment to the third-party customer was the only occasion on which funds actually changed hands in these "round-trip" transactions.

the close of each reporting period, Refco's books would show "loans" to third-party customers and the RGHI receivables would be gone. Then, just days after the financial period closed, the transactions were unwound — the "loans" repaid, and the uncollectible receivables from RGHI were returned to Refco's books. Thus, these transactions enabled Refco to lend money to itself, through third parties, to conceal its grim, multi-hundred million dollar losses from the public and from its investors. (Compl. ¶¶ 579-80.)

II. *The Mayer Brown Defendants' Participation in the Alleged Scheme*

From 1994 until Refco's collapse, Mayer Brown was Refco's outside counsel and was Collins's largest client.[5] (Compl. ¶¶ 76-78.) Mayer Brown and Collins — the partner-in-charge of the Refco account — had a close working relationship with Refco, in which the firm provided the company with a broad range of legal services and through which Mayer Brown collected approximately $5 million per annum in legal fees. (*Id.*) Accordingly, Mayer Brown was familiar with Refco's operations and finances and participated in seventeen rounds of the round-trip loan transactions between 2000 and 2005 by which Refco's uncollectible receivable were concealed. (Compl. ¶¶ 79, 451-52.) Specifically, the role of the Mayer Brown Defendants was to explain the structure and terms of the transactions to potential

[5] Mayer Brown began representing Refco in 1994 when Collins moved to Mayer Brown from Schiff Hardin & Waite and brought Refco with him as a client. (Compl. ¶ 77.)

third-party participants, negotiate the loans, draft and revise the documentation for the transactions including the relevant loan agreements, promissory notes, guarantees and indemnification letters, transmit documents to the participants, distribute executed copies of the documents, and mark the third-party customers' promissory notes to RCM as "paid in full" when the transaction was unwound. (Compl. ¶¶ 451-52, 457-60, 471, 476, 482, 488, 494, 500, 506, 512, 514, 550-58, 564-65, 567, 569-72, 574.) Collins supervised all of these activities, approved bills for the work, personally negotiated and revised some of the loan documents, sent drafts of loan documents to Refco, and discussed the enforceability of the loans with Refco management. (Compl. ¶¶ 550, 556, 560, 567, 571-72, 574.)[6]

III. The Mayer Brown Defendants' Participation in Statements that Refco Used to Issue Securities to Investors

While the round-trip loans concealed the trouble at Refco, certain Refco insiders began to consider cashing out of the company. Their plans began to unfold in 2004

[6] Plaintiffs' opposition papers incorporate the criminal indictment of Collins (Sabella Decl. Ex. 1) into their allegations, arguing that it "confirms in detail Collins' and Mayer Brown's indispensable role in conceiving and effectuating [Refco's] fraudulent scheme." (Pl. Opp. Mem. at 4, n.3.) Whatever its substance, the Court can take judicial notice of the indictment, "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992).

when Refco issued $600 million in bonds (the "Bonds") to public investors in connection with a leveraged buy-out ("LBO"), and came to fruition approximately one year later when Refco conducted a $670 million initial public offering ("IPO"), during which Refco sold approximately one-fifth of its shares to the plaintiff class.[7] (Compl. ¶¶ 6-7, 195.) Both the LBO and the IPO yielded tens of millions of dollars in cash payouts to Bennett and other executives. (*Id.*)

The Mayer Brown Defendants participated in drafting the documents that were filed with the Securities and Exchange Commission ("SEC") in order to induce investors to purchase Refco's Bonds and, later, to effectuate the IPO. (Compl. ¶¶ 116, 127-28, 133, 135, 149-50, 152-53.) Specifically, with respect to the LBO, the Mayer Brown Defendants were involved, as were others,[8] in drafting and disseminating the Offering Memorandum to investors. (Compl. ¶¶ 115, 117.) The Offering Memorandum, which stated that Mayer Brown represented Refco in connection with the offering, concerned the creation of unregistered bonds that,

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[7] Two months later, on October 10, 2005, Refco announced that it had discovered the RGHI receivable and that, accordingly, investors could no longer rely on its financial statements for the preceding four years. (Compl. ¶¶ 233-34.) On October 17, 2005, Refco filed for Chapter 11 bankruptcy protection. (Compl. ¶ 244.)

[8] Participants included, inter alia, Credit Suisse Securities (USA), Banc of America Securities LLC, Deutche Bank, Bennett, Robert C Trosten, Scott L. Jaeckel, and the so-called THL Partners. (Compl. ¶ 115.) All of these parties are defendants in this action.

through an underwriting by certain financial institutions, were purchased and immediately resold to certain institutional investors, including some of the plaintiffs. (Compl. ¶¶ 114, 116, 118.) The portions of the memorandum drafted by the Mayer Brown Defendants included the Management's Discussion & Analysis ("MD&A") and Risk Factors portions, which discussed Refco's business and financial condition in a way that, given Mayer Brown's involvement in the round-trip loan transactions and knowledge of the RGHI receivables, the Mayer Brown Defendants knew to be false. (Compl. ¶¶ 116-17.)

The Offering Memorandum, in turn, was used as the foundation for preparing the Bond Registration Statement whereby the Bonds issued in 2004 were exchanged for registered securities. (Compl. ¶ 165.) With respect to the Bond Registration Statement, the Mayer Brown Defendants, together with banks underwriting the Bonds received and reviewed SEC comment letters and participated in drafting sessions for amendments to the statement.[9] (Compl. ¶ 170.) Like the Offering Memorandum, the Bond Registration Statement contained untrue statements and omissions of material fact because it failed to disclose the existence and full

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[9] Specifically, Refco filed a Form S-4 Registration Statement with the SEC on October 12, 2004, which was subsequently amended through numerous Form S-4/A filings in late 2004 and early 2005 (collectively, the "Bond Registration Statement"). (Compl. ¶ 165.) The Bond Registration Statement became effective, and registered bonds were issued pursuant thereto, on or about April 13, 2005. (Compl. ¶ 166.)

extent of the related-party transactions and the related-party indebtedness between Refco and RGHI. (Compl. ¶¶ 181-94).

Similarly, the Mayer Brown Defendants played a significant role in drafting and reviewing the IPO Registration Statement, which was prepared at the same time as the Bond Registration Statement. The IPO Registration Statement also specifically identified Mayer Brown as counsel to Refco. (Compl. ¶¶ 116, 201.) In that capacity, the Mayer Brown Defendants received and presumably reviewed the SEC's comments. (Compl. ¶ 204.) Both the IPO and Bond Registration Statements were materially false and misleading for the same reasons as the Offering Memorandum — they misrepresented Refco's financial condition and failed to disclose multi-hundred million dollar receivable that were concealed through the round-trip loans that the Mayer Brown Defendants helped facilitate. (Compl. ¶¶ 181, 186, 203.)

IV. Plaintiffs' Claims

As a result of Refco's collapse, the value of plaintiff-investors' interests in Refco plummeted, allegedly causing them millions of dollars in losses. (Compl. ¶¶ 17-19.) Plaintiffs allege that the Mayer Brown Defendants knew, or were reckless in not discovering, that Refco's statements made in the Offering Memorandum, the Bond Registration Statement, and the IPO Registration Statement were false or materially misleading and that, accordingly, defendants should be held primarily liable

for those statements under Section 10(b), either because they participated in drafting the documents and were identified as counsel for Refco in two of the three offering documents, or because they documented the round-trip loans that enabled Refco to issue false and misleading financial statements. Plaintiffs also contend that control person liability under Section 20(a) is sufficiently alleged. The Mayer Brown Defendants move to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(6). The motion will be granted.

DISCUSSION

I. *Motions to Dismiss*

On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept as true all of the factual allegations in the Complaint and draw all reasonable inferences in plaintiffs' favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). Nonetheless, "[f]actual allegations must be enough to raise a right of relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007). Ultimately, the plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. This "flexible 'plausibility standard,' . . . obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), quoting *Twombly*, 127 S. Ct. at 1968 (emphasis in original). If plaintiffs "have not nudged

their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 127 S. Ct. at 1974.

While the rules of pleading in federal court usually require only "a short and plain statement" of the plaintiff's claim for relief, Fed. R. Civ. P. 8, averments of fraud must be "stated with particularity," Fed. R. Civ. P. 9(b). To comply with Rule 9(b), a plaintiff must: "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004)(internal quotation marks omitted). Accordingly, where the fraud is based on alleged misrepresentations, the complaint must "specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001), quoting *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989). A plaintiff pleading fraud based on deceptive conduct "must specify what deceptive or manipulative acts were performed, which defendants performed them, when the acts were performed, and the effect the scheme had on investors in the securities at issue." *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616, 622 (S.D.N.Y. 2006).

Appendix B

II. *Pleading a Violation of Section 10(b) and Rule 10b-5*

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful "for any person, directly or indirectly ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance" in violation of the rules set forth by the Securities and Exchange Commission for the protection of investors. 15 U.S.C. § 78j. Pursuant to SEC Rule 10b-5, promulgated thereunder, it is unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

The Supreme Court recently articulated the elements necessary to sustain a private cause of action for securities fraud under § 10(b) and Rule 10b-5:

Appendix B

> In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. __, 128 S. Ct. 761, 768 (2008), citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005); *see also, e.g., Jay Dees Inc. v. Def. Tech. Sys., Inc.*, No. 05 Civ. 6954, 2008 WL 4501652, at *4 (S.D.N.Y. Sept. 30, 2008)(reciting this articulation of the elements from *Stoneridge*)[10]

In the context of securities fraud complaints, the Private Securities Litigation Reform Act of 1995 ("PSLRA") has expanded on Rule 9(b)'s pleading requirements. See 15 U.S.C. § 78u-4(b). The PSLRA provides that, where misleading statements or omissions

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[10] The Second Circuit has recognized a largely indistinguishable set of elements necessary to state a claim for relief under § 10(b) and Rule 10b-5, which requires that a plaintiff prove that defendants "'(1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury.'" *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007), quoting *In re IBM Sec. Litig.*, 163 F.3d 102, 106 (2d Cir. 1998).

under Section 10(b) are alleged, a plaintiff must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2509-10 (2007). In cases where it is not a statement or omission that is alleged, but rather, a fraudulent scheme to affect the price of stocks, it is sufficient to specify "what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 329 (S.D.N.Y. 2004), quoting *In re Blech Sec. Litig.*, 961 F. Supp. 569, 580 (S.D.N.Y. 1997). Thus, in order for a defendant to be held liable for a claim brought under Rule 10b-5, a plaintiff must allege that the defendant made a false or misleading statement or omission that investors attributed to him or her, or that the defendant "participated in [a] fraudulent scheme or other activity proscribed by the securities laws." *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 111 (2d Cir. 1998)(citations omitted).

III. *Sufficiency of the Rule 10b-5(b) Claim*

In Count Nine of their Complaint, plaintiffs allege that the Mayer Brown Defendants violated § 10(b) and Rule 10b-5(b) when they drafted, reviewed, and revised portions of the Offering Memorandum and the IPO

Registration Statement, which contained false and misleading statements and in which — at the conclusion of each document — Mayer Brown was identified as counsel for Refco. The Mayer Brown Defendants argue that Count Nine should be dismissed because none of the alleged misstatements were actually made by, or otherwise attributed to, Mayer Brown.

The starting point for this analysis is *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), which held that § 10(b) imposes liability only on a person who makes a material misstatement or omission, and that there is no liability for aiding and abetting fraudulent conduct. *Id.* at 177. In *Shapiro v. Cantor*, 123 F.3d 717 (2d Cir 1997), the Second Circuit, observed that "[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting ... *no matter how substantial that aid may be* ...." *Id.* at 720 (emphasis added). This requirement draws a "bright line" between the conduct of a secondary actor and that of a primary violator. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998). To rise to the level of a primary violation, the secondary actor must not only make a material misstatement or omission, but "the misrepresentation must be attributed to the specific actor at the time of public dissemination," such as in advance of the investment decision, so as not to undermine the element of reliance required for § 10(b) liability. *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 153 (2d Cir. 2007),

quoting *Wright*, 152 F.3d at 175. "Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms ... all fall within the prohibitive bar of *Central Bank*." *Shapiro*, 123 F.3d at 720.

Nor can silence or mere association be construed as nonetheless conveying an actor's "imprimatur." *Lattanzio*, 476 F.3d at 155.

> Public understanding that [a secondary actor] is at work behind the scenes does not create an exception to the requirement that an actionable misstatement be made by the [secondary actor]. Unless the public's understanding is based on [that actor's] articulated statement, the source for that understanding - whether it be a regulation, an accounting practice, or something else - does not matter.

Id. (holding that a securities regulation requiring that the company's accountant review the quarterly unaudited financial statements did not "associate" the accountant with those statements to such a degree that, without more, those statements became the accountant's statements). Here, the decisive question is whether the allegations against the Mayer Brown Defendants are sufficient to show that they "made" the alleged material misstatements and omissions such that plaintiffs relied on the *defendants'* misrepresentation. Plaintiffs have not made such a showing.

Appendix B

Lattanzio explains that only an "articulated statement" of attribution to a secondary actor is sufficient. *Id.*; *accord United States v. Finnerty*, 533 F.3d 143 (2d Cir. 2008); *see also In re Alstom SA*, 454 F. Supp. 2d 187, 204 (S.D.N.Y. 2006)(noting that the attribution requirement is "of particular concern" when plaintiffs seek to hold outside secondary actors like accountants and auditors liable for a corporation's misleading statements). The Offering Memorandum and the IPO Registration Statement each mention Mayer Brown only once in their nearly two-hundred pages - at the coda, and under the subheading "legal matters," in which counsel for Refco and counsel for the purchasers are identified. (Borden Decl. Ex. A "Offering Memorandum" at 172; *id.* Ex. C "IPO Registration Statement" at 125.) Throughout these documents, where outside entities did supply content, the source of that content is identified. At no point, however, do these documents attribute any of their contents to Mayer Brown, including with respect to the portions of the documents that the Mayer Brown defendants participated in drafting, such as the "Management's Discussion and Analysis" portion of the Offering Memorandum which attributes its analysis solely to Refco's *management* (Borden Decl. Ex. A "Offering Memorandum" at 50), and the Risk Factors section of the IPO Registration Statement which clearly states that, "[p]resented below are all the risks that *management* deems material ...." (*id.* Ex. C "IPO Registration Statement" at 11) (emphasis added). This, without more, is not an "articulated statement" by the Mayer Brown Defendants.

Plaintiffs seem to concede as much, arguing — citing this Court's opinion in *Global Crossing* — that it is not the mere mention of Mayer Brown as counsel-of-record that imputes the statements to the defendants, but rather that "investors [were] sufficiently aware of defendant's participation that they may be found to have relied [on the statement] . . . as if the statement had been attributed to [Mayer Brown]." 322 F. Supp. 2d at 332-33. Even if, after *Lattanzio*, *Global Crossing* remains good law,[11] plaintiffs have neither alleged any facts showing that at the time of their investment they or other members of the investing public "almost certainly understood [Mayer Brown] to be the speakers," *In re Converium Holding AG Sec. Litig.*, No. 04 Civ. 7897, 2006 WL 3804619, at *12 (S.D.N.Y. Dec. 28, 2006), nor alleged the rather extraordinary awareness found sufficient in *Global Crossing*, in which this Court observed that

> it is undisputed, as a matter of public record, that Andersen's audit reports were included in all of GC's registration statements and annual reports from 1998 to 2000, and that

[11] *Lattanzio* does not discuss *Global Crossing* and the Mayer Brown Defendants question whether *Global Crossing* and the cases that follow it can be reconciled with *Lattanzio*'s renewed endorsement of *Wright* and its prohibition against relying on "public understanding" to attribute statements to actors for purposes of Rule 10b-5 liability. It is not necessary, however, to reach that issue, since plaintiffs have not pleaded facts that would meet even this "relax[ed]" version of the *Wright* standard. *Global Crossing*, 322 F. Supp. 2d at 331.

> they were widely available to shareholders during the class period. Andersen's role as GC's auditor was thus well known to investors, who could easily have relied on the accounting firm's involvement in making any public financial reports, even where a particular statement was not publicly attributed to it. Moreover, Andersen's aggressive marketing of the novel accounting strategies promoted in the White Paper, which allegedly "became a 'must-read' in the telecom industry," raises an inference that sophisticated investors would have known of Andersen's role in creating the reporting practices behind GC's false statements. These allegations are sufficient to raise a reasonable inference not only that Andersen was one of the 'makers' of the statements, but also that investors viewed it as such.

Global Crossing, 322 F. Supp. 2d at 334 (distinguishing these extraordinary allegations from those insufficient to transcend the proscribed category of aiding and abetting liability).

Here, plaintiffs allege that Mayer Brown's involvement in the drafting process "provides more than a sufficient basis for 'attributing' the false statements therein to Mayer Brown." (Pl. Opp. Mem. at 15.)[12] Even

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[12] At one point, plaintiffs also argue that the fact that the Mayer Brown Defendants "devised and perpetrated a fraudulent scheme to falsify the issuer's financial statements" (Cont'd)

if the Mayer Brown Defendants played a substantial role in drafting the statements at issue, however, the relevant inquiry is not simply the extent of their involvement viewed in hindsight, but whether, at the time, plaintiffs reasonably understood Mayer Brown to be speaking through the release. *Global Crossing*, 322 F. Supp. 2d at 332-33; *see also In re Converium*, 2006 WL 3804619, at *12. To that end, plaintiffs' meager allegation — that the mention in the Offering Memorandum and the IPO Registration Statement that Mayer Brown was Refco's primary outside counsel, and that accordingly investors expected that "Mayer Brown was involved in the preparation and review of those documents" (Compl. ¶ 749) — is plainly insufficient to

(Cont'd)
provides a basis for attributing the misstatements in the financial statements to Mayer Brown. (Pl. Opp. Mem. at 17.) This argument improperly conflates the distinct elements of a claim for false statements under subsection (b) of Rule 10b-5, which requires a misrepresentation or omission, with those of a claim for engaging in a fraudulent scheme under subsections (a) or (c). *See* 17 C.F.R. § 240.10b-5; *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972) (drawing a distinction between the two kinds of claims); *cf. Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177-78 (2d Cir. 2005) (finding that "where the sole basis for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a [fraudulent scheme] claim under Rule 10b-5(a) and (c)"). Plaintiffs' allegation that Mayer Brown was behind the scenes papering the loans that concealed the RGHI receivables is not relevant to the issue of what investors understood Mayer Brown's role to be at the time plaintiffs made their investment. Accordingly, plaintiffs cannot offer their fraudulent scheme claim as proof for their fraudulent misstatement claim.

establish a primary violation by *Global Crossing*'s own terms. *See id.* at 333 (finding no liability where an accountant "merely reviewed and approved" unaudited statements or was "instrumental in helping" the company prepare the statements at issue).

Further, unlike in *Global Crossing*, where the plaintiffs pleaded facts that raised a reasonable inference that *investors knew* that Andersen had masterminded the misleading accounting behind the issuer's false statements, here plaintiffs have offered no reason why the Mayer Brown Defendants' status as counsel for Refco would be understood by investors as an endorsement of the accuracy of Refco's assertions about its financial condition. Nor is such an inference self-evident. Indeed, it is implausible that the mere fact that the issuer's law firm was identified in the offering documents would, without a great deal more, be perceived as an articulation by that law firm of the accuracy of the statements made in those documents.

Although it is well settled that a lawyer who makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under § 10(b) and Rule 10b-5(b), *Central Bank*, 511 U.S. at 191, it is equally well settled that "a secondary actor cannot incur primary liability ... for a statement not attributed to the actor at the time of its dissemination" precisely because "[s]uch a holding would circumvent the reliance requirements of the Act." *Wright*, 152 F.3d at 175; *Lattanzio*, 476 F.3d at 154-55. Accordingly, Count Nine of the Complaint as to the Mayer Brown Defendants must be dismissed.

Appendix B

IV. *Sufficiency of the Rule 10b-5(a) and (c) Claim*

In addition to liability for its statements in the offering documents, plaintiffs posit an alternative theory of liability, commonly known as "scheme liability," for Mayer Brown's role in the fraud alleged: subsections (a) and (c) of Rule 10b-5, which prohibit "employ[ing] any device, scheme or artifice to defraud," or "engag[ing] in any act, practice or course of business which operates ... as a fraud or deceit upon any person" in connection with the sale of securities. 17 C.F.R. § 240.10b-5(a), (c). Plaintiffs allege that the Mayer Brown Defendants "design[ed] and implement[ed] sham transactions used by Refco to fraudulently transfer uncollectible debt and design[ed] and participat[ed] in blatantly fraudulent sham loan transactions." (Compl. ¶ 766.) The Mayer Brown Defendants seek dismissal of this claim, inter alia, on the ground that the Supreme Court's decision in *Stoneridge* forecloses this theory of liability. They are correct.

In *Stoneridge*, the Court examined the issue of "when, if ever, an injured investor may rely upon § 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)." 128 S. Ct. at 767. Specifically, the Court considered whether two vendors of a cable operator that entered into various sham transactions with the cable operator to artificially increase the; cable operator's publically reported revenues could be held liable for violating § 10(b). The vendors were not alleged to have made any

misstatements directly to the public, but instead were alleged to have knowingly participated in the scheme with the purpose of creating a false appearance about the cable operator's revenues. While finding that "[c]onduct itself can be deceptive," the Court ultimately concluded that the vendors could not be held liable because the vendors' "deceptive acts, which were not disclosed to the investing public [were] too remote to satisfy the requirement of reliance ... except in an indirect chain ... too remote for liability." *Id.* at 769-70. Precisely because "[t]he conduct of the secondary actor must satisfy each of the elements or preconditions for liability," a mere allegation of "'scheme liability' . . . does not answer the objection that petitioner did not in fact rely upon [the defendants'] own deceptive conduct." *Id.* at 770. Accordingly, allegations that a defendant committed a deceptive act, even one in furtherance of a scheme to defraud investors, are insufficient. *Id.* at 771; *see id.* at 770 (rejecting this interpretation of reliance because the implied cause of action would then "reach the whole marketplace in which the issuing company does business; and there is no authority for this rule").

Here, there is no dispute that plaintiffs had no knowledge of the Mayer Brown Defendants' conduct that facilitated the fraudulent transactions. Plaintiffs' Complaint specifically alleges that "[p]laintiffs ... purchased Refco securities" "[i]n ignorance of the fraudulent conduct of Collins, Mayer Brown" and others. (Compl. ¶ 771.) Accordingly, the Mayer Brown Defendants contend that no liability can attach because plaintiffs could not have relied on their conduct, just as

the plaintiffs in *Stoneridge* did not know of, and thus could not have relied on, the transactions in that case. *See Stoneridge*, 128 S. Ct. at 769.

Plaintiffs nevertheless attempt to distinguish *Stoneridge*, arguing that the Mayer Brown Defendants were not unrelated suppliers or customers such that they were "remote" from the issuer and that Mayer Brown's conduct "made it necessary or inevitable for [the issuer] to record the transactions as it did." *Id.* at 769-70. This line of argument is unavailing. The nub of plaintiffs' contention is that as Refco's primary counsel, the Mayer Brown defendants could not be "remote" within the meaning of *Stoneridge*, because they were directly involved in creating and executing the fraudulent scheme, including the drafting of misleading communications to Refco investors. (Pl. Opp. Mem. at 23-24.) Plaintiffs' reading of "remote" is myopic. The issue is not the distance between the issuer and the defendant, but rather the distance between the defendant's conduct and the investor.

As in *Stoneridge*, plaintiffs admittedly did not know of, and thus did not rely on, any of Mayer Brown's work on the fraudulent loan transactions. Nor can plaintiffs salvage their claim by arguing that the "inevitable consequence" of the transactions on which Mayer Brown worked were the misstatements on which investors relied. In *Stoneridge* as well, the transaction at issue - participation by outside vendors in an issuer's patently fraudulent scheme to create fictitious documents and backdate contracts - had no other

plausible purpose than to misstate the issuer's financial condition, but this fact was insufficient to establish liability, because irrespective of the obviousness of the fraudulent scheme to the participating defendants, or the importance of their participation to the execution of the scheme, the defendants' conduct was too remote from the investing public to satisfy the reliance element of § 10(b). *Id.* at 770-71 (finding that liability "does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way"). Here, the Mayer Brown Defendants were not even the counter-party to the fraudulent transactions; they merely participated in drafting the documents to effect those transactions.

As alleged in the Complaint, the Mayer Brown Defendants explained the structure and terms of the transactions to potential third-party participants; negotiated the loans; drafted and revised the documentation for the transactions including the relevant loan agreements, promissory notes, guarantees and indemnification letters; transmitted documents to the participants; distributed executed copies of the documents; and marked the third-party customers' promissory notes to RCM as "paid in full" when the transaction was unwound. (Compl. ¶¶ 451-52, 457-60, 471, 476, 482, 488, 494, 500, 506, 512, 514, 550-58, 564-65, 567, 569-72, 574.)

Plaintiffs have clearly alleged facts, including the suspicious timing and the "risk-free" quality of the loans, that give rise to a strong inference of scienter,

that is, that the Mayer Brown Defendants knew or acted in reckless disregard of Refco's intention to use the transactions to inflate its revenues, and knew or should have known that the resulting financial statements issued would be relied upon by research analysts and investors. Plaintiffs allege, moreover, that acting with such knowledge, the Mayer Brown Defendants engaged in conduct that materially aided Refco's fraud. Such allegations if proven true, are adequate to establish liability for aiding and abetting securities fraud, but are not enough to establish civil liability as a *primary* actor. As was the case in *Stoneridge*, it was Refco, not the Mayer Brown Defendants, "that ... filed fraudulent financial statements; nothing [the Mayer Brown Defendants] did made it necessary or inevitable for [Refco] to record the transactions as it did." 128 S. Ct. at 770.

The critical holding of *Central Bank* — that liability to investors under Rule 10b-5 does not extend to those who merely aid and abet violations by primary actors — is not limited to violations of Rule 10b-5(b). To establish liability under the other subsections of the Rule as well, a plaintiff must show that it was the defendant itself that "employ[ed]" the scheme to defraud or "engage[d] in the deceitful practice, and not merely that the defendants assisted another party in its fraudulent practices. Here the scheme to defraud was Refco's effort to hide from its investors the true state of its finances by concealing the uncollectible receivables and it was Refco that engaged in the deceitful practice of making the round-trip loans and reporting them in its financial

statements as if they were bona fide loan transactions. However significant a role the Mayer Brown Defendants played in assisting Refco's management to engage in these transactions, and however culpable they may have been to do so with the knowledge that the transactions were ultimately designed as part of a scheme to defraud and practice a deceit upon Refco's shareholders — indeed even if the acts of Collins were, as the Government has charged, criminal — the liability that attaches to those acts is liability for aiding and abetting Refco's schemes and manipulation, not principal liability for executing schemes of the Mayer Brown Defendants' own.

Plaintiffs' attempts to argue to the contrary are unpersuasive because it was Refco's decision how to account for the transactions at issue; plaintiffs have pleaded no facts that would support — nor could they — that the Mayer Brown Defendants were, in fact, "control[ling]" Refco's misleading communications to investors. (*See* Pl. Opp. Mem. at 23-24.) Indeed, plaintiffs' allegations are substantially similar to those found insufficient by the Court in *Stoneridge* because the defendants ultimately merely facilitated the preparation of the fraudulent scheme rather than -- as required — engaged in the fraudulent sale of securities pursuant to that scheme.

A thoughtful and highly-respected judge in this district has, following *Stoneridge*, and under similar circumstances, come to precisely this conclusion. *See In re Parmalat Sec. Litig.*, 570 F. Supp. 2d 521 (S.D.N.Y.

2008)(Kaplan, J.). In that case plaintiffs argued that the issuer's offering documents made the public aware of the underlying, allegedly deceptive transactions in which the defendant law firm was involved. *Id.* at 525. The court, having previously upheld on a motion to dismiss some but not all of plaintiffs scheme liability claims against the firm,[13] found this argument "unconvincing" and granted summary judgment in favor of the firm on the basis that "nothing about [the issuer's] disclosures describes any of [the law firm's] own conduct, much less conduct that was deceptive." *Id.* at 525-26; *see also In re DVI, Inc. Sec. Litig.*, 249 F.R.D. 196, 216-18 (E.D. Pa. 2008) (refusing to certify a class against an issuer's law firm notwithstanding allegations of the law firm's "unique role in initiating and masterminding certain aspects of the overall scheme" because "the fact remains that none of this alleged conduct was publically disclosed such that it affected the market for [the issuer's] securities"). As in *In re Parmalat Sec. Litig.*, "even assuming the truth of plaintiffs' factual allegations and granting every reasonable inference therefrom,

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[13] Plaintiffs contend that this decision, *see In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005), which pre-dates *Stoneridge*, lends support to their position. (Pl. Opp. Mem. at 29-30.) This reliance is wholly undermined, however, both by Judge Kaplan's recent decision following *Stoneridge* and by the fact that in his earlier decision Judge Kaplan had summarily dismissed a number of plaintiffs' allegations quite similar to those at bar and determined that the law firm could only be held liable when it became an active counterparty — by itself "creat[ing] and controll[ing] shell companies — in the transactions that effectuated the fraud. *See*, 383 F. Supp. 2d at 624-26 & nn.39 & 43.

plaintiffs' evidence would establish only that investors relied on [Refco's] deceptive disclosures concerning transactions [in] which [the Mayer Brown Defendants] were [involved]." 570 F. Supp. 2d at 526.

Finally, plaintiffs argue that they are nevertheless entitled to a presumption of reliance under three distinct theories. None of the presumptions applies here. First, plaintiffs invoke *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), for the presumption that "if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance." *Stoneridge*, 128 S. Ct. at 769, citing *Affiliated Ute*, 406 U.S. at 153-154. The Mayer Brown Defendants owed no duty of disclosure to Refco's investors. *See In re Parmalat Sec. Litig.*, 570 F. Supp. 2d at 526 ("even assuming *arguendo* the applicability [of professional rules and a violation thereof] it would not follow that [the law firm] breached a legal duty *to the plaintiffs*")(emphasis in original); *see also Finnerty*, 533 F.3d at 149-50 (citing *Lattanzio* and rejecting criminal liability based on investors' "background assumption" of compliance with NYSE rules). Second, plaintiffs invoke the fraud-on-the-market doctrine as announced in *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988), in which reliance is presumed when the statements at issue become public. Here, it is undisputed the Mayer Brown's deceptive acts were not communicated to the public; as in *Stoneridge*, "no member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times." 128 S. Ct. at

769. Accordingly plaintiffs "cannot show reliance upon any of respondents' actions except in an indirect chain ... too remote for liability." *Id.*

Third and finally, plaintiffs invoke the so-called "fraud-created-the-market" presumption, where reliance may be presumed if the defendants' fraudulent activity is "so pervasive that it goes to the very existence of the [securities] and the validity of their presence on the market." *Ross v. Bank South, N.A.*, 885 F.2d 723, 729 (11th Cir. 1989). This Circuit has never adopted this presumption and it has been criticized by at least two other Courts of Appeals. *See Ockerman v. May Zima & Co.*, 27 F.3d 1151, 1159 (6th Cir. 1994); *Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993)(rejecting the presumption). Whatever its merits (and those merits appear to be in grave doubt after *Stoneridge*), courts that apply the presumption appear to agree that the touchstone of this standard is "unmarketability." Such "unmarketability" must mean either economic unmarketability, which occurs when a security is patently worthless, or legal unmarketability, which occurs when a regulatory or municipal agency would have been required by law to prevent or forbid the issuance of the security. *Joseph v. Wiles*, 223 F.3d 1155, 1163-66 (10th Cir. 2000) (citing cases). Plaintiffs' allegations here fall far short of alleging that Refco stock could not have been sold at any price or that Refco bonds could not have been offered at any combination of price and interest rate. *See Ross*, 885 F.2d at 729-30. Nor are there any allegations that the issuer was prohibited from issuing the securities as a matter of law.

Appendix B

T.J. Raney & Sons, Inc. v. Fort Cobb, Okla. Irrigation Fuel Auth., 717 F.2d 1330, 1333 (10th Cir. 1983).[14]

In sum, even if the Mayer Brown Defendants' conduct helped Refco to carry out their scheme to defraud investors, under *Stoneridge* plaintiff-investors have no claim under the federal securities laws against the Mayer Brown Defendants.[15] At most, the Mayer

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[14] Although plaintiffs point to a single paragraph in the Complaint, which alleges that had investors known about the Refco fraud "there would have been no market for the Bonds." (Compl. ¶ 733), plaintiffs have pleaded no facts to support that conclusion, and the vast weight of the Complaint establishes only that "had Refco's true financial picture been disclosed to investors at the time of the Bond Offering, investors would have known that the credit risk associated with the Bonds was substantially greater than they otherwise believed," (Compl. ¶ 733). Specifically, in both Counts Nine and Eleven of the Complaint, plaintiffs allege only that as a result of the Mayer Brown Defendants' conduct, they "purchased Refco securities at artificially inflated prices." (Compl. ¶¶ 753, 771.) Under these circumstances, plaintiffs cannot rely on a "fraud-created-the-market" presumption as a stand-in for reliance on defendants' "own deceptive conduct." *Stoneridge*, 128 S. Ct. at 770.

[15] It is perhaps dismaying that participants in a fraudulent scheme who may even have committed criminal acts are not answerable in damages to the victims of the fraud. However, as the Court noted in *Stoneridge*, the fact that the plaintiff-investors have no claim is the result of a policy choice by Congress. 128 S. Ct. at 769. In 1995, in reaction to the Supreme Court's decision in *Central Bank*, Congress authorized the SEC — but not private parties — to bring enforcement actions against those who "knowingly provide [ ] substantial assistance to another person" in violation of the federal securities laws. (Cont'd)

Brown Defendants were culpable aiders and abettors. Accordingly, Count Eleven of the Complaint as to the Mayer Brown Defendants will be dismissed.

V. *Section 20(a) - Control Person Liability*

As plaintiffs have failed to plead Section 10(b) claims against the Mayer Brown Defendants, plaintiffs' Section 20(a) claims, 15 U.S.C. § 78t(a), in which they seek to impose control person liability for alleged Section 10(b) and Rule 10b-5 violations by former Mayer Brown partner Collins, fail as a matter of law because plaintiffs have not made out a prima facie case of any such violations by any of those defendants. *See In re Pfizer,*

(Cont'd)

See PSLRA, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757, codified in 15 U.S.C. § 78t(f). This choice may be ripe for legislative re-examination. While the impulse to protect professionals and other marginal actors who may too easily be drawn into securities litigation may well be sound, a bright line between principals and accomplices may not be appropriate. There are accomplices and there are accomplices: after all, in the criminal context when the Godfather orders a hit, he is only an accomplice to murder - one who "counsels, commands, induces or procures" but he is nonetheless liable as a principal for the commission of the crime. 18 U.S.C. § 2(a). Likewise, some civil accomplices are deeply and indispensably implicated in wrongful conduct. Perhaps a provision authorizing the SEC not only to bring actions in its own right but also to permit private plaintiffs to proceed against accomplices after some form of agency review would provide the necessary flexibility without involving the courts in standardless and difficult-to-administer line-drawing exercises.

Inc. Sec. Litig., 538 F. Supp. 2d 621, 637 (S.D.N.Y. 2008)("Section 20(a) claims are necessarily predicated on a primary violation of securities law ...."), citing *Rombach*, 355 F.3d at 177-78. Accordingly Count Fifteen of the Complaint as to Mayer Brown is dismissed.

CONCLUSION

For the reasons stated above, the Second Amended Consolidated Class Action Complaint is dismissed in its entirety as to the Mayer Brown Defendants. As this ruling disposes of all claims against Joseph P. Collins and Mayer Brown LLP and there is no just reason for delay, the Clerk is directed, pursuant to Fed. R. Civ. P. 54(b), to enter final judgment with respect to those defendants.

SO ORDERED:

Dated: New York, New York
March 17, 2009

/s/ Gerard E. Lynch

GERARD E. LYNCH
United States District Judge

APPENDIX C — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. [s]: 09-1619-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of July, two thousand ten.

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC and RH CAPITAL ASSOCIATES LLC,

Plaintiffs-Appellants,

PIMCO FUNDS: PACIFIC INVESTMENT MANAGEMENT SERIES, ET AL.,

Plaintiffs,

v.

MAYER BROWN LLP and JOSEPH P. COLLINS,

Defendants-Appellees,

REFCO INC., ET AL.,

Defendants.

Appendix C

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC and RH CAPITAL ASSOCIATES LLC having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk of Court

APPENDIX D — RELEVANT STATUTORY AND REGULATORY PROVISIONS

15 U.S.C. 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact

necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.